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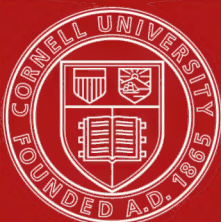
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A Treatise on the law and practice of re



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A TREATISE
ON THE
Law and Practice of
Receivers

Being an Analysis of and Commentaries on the Usages
and Rules of Equity Pertaining to Receivers as
Established and Applied by the Courts of
the United States and Great Britain; in-
cluding Practice, Procedure, Pleadings
and Forms in Receivership Cases
with a carefully prepared Chap-
ter on "The Trading with
the Enemy Act" as it
relates to Alien Prop-
erty Custodians

VOLUME I

By ^{WING}
RALPH E. CLARK
Of the Cincinnati Bar

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1918

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RALPH E. CLARK

PREFACE

I have attempted in this work to make an analysis of the usages and rules of equity underlying the law and practice of receivers and to present to the reader the decisions and legislative enactments applicable to the various phases of this most important subject.

To intelligently study the decisions and statutes on the subject of receivers without an underlying knowledge of the general principles of equity would be like attempting an exhaustive study of Homer without at the same time studying the Greek language; for this reason the work has been extended, at times, beyond the strict confines of receivers and has touched upon such matters of equity jurisprudence generally as pertain to or lead up to the law of receivers.

Many old English decisions, as precedents for our American courts, have been cited, because, before the time of Chancellor Kent, no American cases covering receivers were printed which are readily available today. In addition, many modern English cases have been cited, because the English courts of highest authority today are more prone than our American courts to go at length into the whys and wherefores of their rulings, while the American courts are accustomed to cite numerous authorities as precedents for their decisions. It has been the aim and endeavor of the author to point out and indicate the differences in the law and practice of receivers which obtain in England and America, and in so doing, make readily available and more intelligible to the American practitioner and student that vast storehouse of valuable precedent on the law of receivers found in the English Reports. This work being an American produc-

tion, it is hardly necessary to add that citations appear from both federal and state decisions on every question discussed, when such decisions could be found.

I have indicated by chapter headings the major subjects into which the law of receivers naturally resolves itself and have analyzed each chapter and divided it into sections and at times into subsections. An analytical table of contents precedes each chapter. There are instances where the text covers subject-matter which might from one viewpoint and under one classification be placed in one chapter, and from another viewpoint and under another classification be placed under another chapter. In such cases the reader, by examining the carefully prepared index and availing himself of the cross-references, will be able, it is believed, to readily find the subject-matter in which he is particularly interested.

Volume One treats of the law of receivers as laid down by the courts from time to time. The opening chapter covers the origin of receivers and the concluding chapter discusses at length the duration of receiverships, removal and discharge of receivers. The various phases and subdivisions of the law of receivers as expressed by the courts are treated in the intervening chapters.

Volume Two presents, in as concise and definite form as seems possible, the law of receivers as expressed by the acts of Parliament, the acts of Congress and the acts of the various state legislatures. Judicature, judiciary, procedure acts, judicial and civil codes, as affecting the procedure in receiverships, are treated at length. A chapter is devoted to statutes which affect not only the procedure in receivership cases, but also the substantive rights of litigants, claimants and receivers themselves. Analogous statutes from different states and those covering the same general purposes have been grouped together for ready reference and comparison. It is not possible, within the limitations of this work, to print the text of the numerous state statutes in full; they have therefore been cited. In addition, text will be found covering the history of these statutes and

comment thereon, and a number of sections devoted to the nature and construction of statutes affecting receiverships.

In Volume Two such parts of the bankruptcy statutes, both of England and of the United States, as affect receiverships, are printed in full. An important feature of the work consists of a collection of about two hundred practical forms, which have been gathered together from actual cases pending or adjudicated in the highest courts of the land. No lawyer, in preparing a case, can reject the use of a form and the suggestions which may be found therein covering a case analogous to the one in which he is interested.

No treatise of the law of receivers published during this world war would be complete without a chapter on the subjects of "Trading with the Enemy" and "Alien Property Custodians," because the taking of alien enemy property by a belligerent government in time of war offers many close analogies to the taking of property of litigants by courts of equity in time of peace. Accordingly, in Volume Two will be found a chapter on the subject of "Custodians of Alien Enemy Property." In order to present this subject intelligently, it has seemed necessary, to touch generally upon the subject of "Trading with the Enemy." I have accordingly done so, printing the United States Trading with the Enemy Act and citing the several English Trading with the Enemy Acts. I have commented at length on both the English and United States Acts, presented a memorandum of decisions on Trading with the Enemy at common law, handed down by various United States courts, and also a memorandum of English decisions under the recent English Acts.

I wish to give full credit for the memoranda of these cases to Mr. Charles Warren, Assistant Attorney General of the United States, who drafted the United States Trading with the Enemy Act and presented it to the various committees of Congress.

I wish to acknowledge indebtedness to Miss Caroline C. Collins, Librarian of the Library of the United States Circuit Court of Appeals for the Sixth Circuit, for the valuable assistance

given me from time to time in hunting for buried cases and straightening out many obstruse citations.

The writer offers the result of his labors to the profession with the hope that it may have some merit both in substance and in form and may add something to the many excellent contributions of the bench and the bar to the ever-broadening field of receiverships.

RALPH E. CLARK.

Cincinnati, Ohio, March 25, 1918.

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- Auditor v. Davis ([1841], 2 Ark. 503), 83.
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- Bank v. Central C. & C. Co. ([1902], 115 Fed. 878), 834, 835, 856, 861, 888.
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- Beard v. Independent Dist. of Pilla City ([1898], 88 Fed. 375), 902.
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- Beck v. Burdett ([1829], I Paige 305), 216, 224, 523, 524, 525.
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- Becker Bros. v. Berner's Bay Mining Co. ([1907], 3 Alaska 280, 17), 636.
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- Bill v. Western Union Tel. Co. ([1883], 16 Fed. 19), 270.
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- Bosworth v. Terminal R. Assn. ([1898]), 174 U. S. 182, 43 L. ed. 941, 19 S. C. Rep. 625), 645, 738, 739, 740, 741, 743, 796.
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- Brinton v. Wood ([1859], 19 How. Pr. 162, New York Civil Code), 60.
- Brislowe v. Needham ([1847], 2 Phil. 190), 618, 871, 922, 952.
- Bristow v. Home Bldg. Co. ([1895], 91 Va. 18, 20 S. E. 946), 750, 975, 976.
- Britain v. Rossiter ([1883], II Q. B. D. 123), 1004.
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- British Power, etc., *In re* ([1906], 1 Ch. 497), 636.
- British Power, Traction and Lighting Co., Ltd., *In re* ([1910], 2 Ch. D. 476), 30.
- Brittania Mining Co., *In re* ([1912], 197 Fed. 459), 564, 678.
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[References are to pages]

- Bryan v. Block ([1889], 52 Ark. 458, 12 S. W. 1073), 691.
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- Carson v. Allegheny Window Glass Co. ([1911], 189 Fed. 791), 236, 237, 240, 241, 264, 268, 278.
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- Central Trust Co. v. Wheeling & L. E. R. Co. ([1911], 189 Fed. 82), 775.
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- Chapman cases ([1866], L. R. 1 Eq. Cas. 346), 588, 590.
- Chapman v. American Surety Co. ([1914], 261 Ill. 594), 1038.
- Charrington & Co. v. Camp ([1902], 1 Ch. D. 386), 509.
- Charrington H. Co. v. Camp ([1902], II Ch. D. 390), 543.
- Chase v. Curtis ([1884], 113 U. S. 452, 28 L. ed. 1138), 339, 340.
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- Chemical Nat. Bk. v. Armstrong (59 Fed. 372, 28 L. R. A. 231), 964.
- Chemical Nat. B. v. Hartford ([1895], 161 U. S. 1, 40 L. ed. 595, 16 Sup. Ct. Rep. 439), 586, 597, 600.
- Cheney v. Maumee Cycle Co. ([1901], 64 O. S. 205, 60 N. E. 207), 64.
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- Chicago & A. R. Co. v. U. S. & M. T. Co. ([1915], 225 Fed. 940), 180, 184, 783, 933, 959.
- Chicago Deposit Vault Co. v. McNulta (153 U. S. 554, 38 L. ed. 819, 14 S. C. Rep. 915), 27, 325, 596, 605, 606, 619, 854, 899.
- Chicago, etc., v. United States M. & T. Co. ([1915], 225 Fed. 940), 184, 185, 209, 937, 938, 939.
- Chicago v. U. S. & M. T. Co. ([1915], 225 Fed. 940), 801.
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- Clubb v. Upton ([1877], 95 U. S. 665, 24 L. ed. 523), 346, 354.
- Church Const. Co. ([1907], 157 Fed. 298), 417.
- Church v. Ruland ([1870], 64 Pa. 434), 12.
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- Clark v. American Surety Co. ([1898], 171 Ill. 235, 49 N. E. 481), 894.
- Clark v. Bever ([1891], 139 U. S. 96, 35 L. ed. 88), 352, 353.
- Clark v. Booth (17 How. 327, 15 L. ed. 164), 451.
- Clark v. Brown ([1902], 119 Fed. 131), 889.
- Clark v. Dew (1 R. & M. 103), 716.
- Clark Coal & Coke Co., *In re* ([1909], 173 Fed. 658), 392, 413, 456, 457, 458, 646.
- Clarke v. Morey ([1813], 10 Johns. 69), 1159.
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- Codrington v. Parker (14 Ves. 469), 172.
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- Codwise v. Gelston ([1812], 10 Johns. [N. Y.] 520), 225, 949.
- Coe v. Patterson ([1907], 106 N. Y. S. 659), 839, 842.
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- Cole v. Philadelphia & E. Ry. Co. ([1905], 140 Fed. 944), 296, 297.
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- Connecticut River B. Co. v. Rockbridge ([1895], 73 Fed. 709; affirmed [1897], 80 Fed. 441), 504, 573.
- Connell Iron Works, J. B., *In re* ([1916], 138 La. 702, 70 So. 617), 962.
- Connolly v. Dickson ([1881], 76 Ind. 444), 210.
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[References are to pages]

- Const. v. Harris ([1824], Tur. & Rus. 496), 143, 145, 189.
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[References are to pages]

- Cowdry v. Railroad Co. (6 Fed. Cas. Nos. 660, 663, 664), 926.
- Cowen v. Pennsylvania Glass Co. (184 Pa. 1, 38 Atl. 1075), 275.
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- Coy v. Title Guarantee & Trust Co. ([1907], 157 Fed. 794), 729.
- Craighead v. Wilson ([1855], 18 How. 199, 15 Law Ed. 332), 747.
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- Cutts v. Brainard ([1870], 42 Vt. 566), 302.

[References are to pages]

D

- Daimler Co. v. The Continental Tyre & Rubber Co., H. L. (E) ([1916], 2 A. C. 307, 85 L. J. K. B. 1333, 114 L. T. 1049 [1916], W. N. 269, 22 Com. Cas. 32, 32 T. L. R. 624, 60 S. J. 602), 1160.
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- Delfosse v. Crawshaw ([1835], 4 L. J. Ch. [N.S.] 32), 864.

[References are to pages]

- Delozier v. Bird ([1898], 123 N. C. 693, 31 S. E. 834), 510.
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[References are to pages]

- Dows v. Congdon (28 N. Y. 122), 753.
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- Drennen v. Mercantile Deposit Co. ([1896], 115 Ala. 592, 23 So. 164), 940, 941.
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- Duncan v. United States ([1833], 7 Peters 433, 8 L. ed. 739), 1007.
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- Dyer v. Power (39 N. Y. St. R. 136, 14 N. Y. Sup. 873), 485.

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- Eameston v. Lyde ([1829], 1 Paige 637), 223, 522, 527, 528, 556.
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- Edison v. Edison U. P. Co. ([1894], 52 N. J. Eq. 620, 29 Atl. 195), 273.
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- Estate of Graff, *In re* ([1910], 86 Neb. 535, 125 N. W. 1091), 95, 980.
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- Farmers L. & T. Co. v. Postal ([1887], 55 Conn. 335), 664.
- Farmers L. & T. Co. v. Winona ([1893], 59 Fed. 957), 298.

[References are to pages]

- Farmers Loan & Trust Co. v. Central R. & Banking Co. of Georgia, et al. ([1895], 166 Fed. 333), 329, 604, 607, 803.
- Farmers Loan & Trust Co. v. Central R. R. of Iowa (2 McCrary 181, 7 Fed. 537), 705.
- Farmers Loan & T. Co. v. Eaton ([1902], 114 Fed. 14), 616.
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- Farmers Loan Co. v. Lake St. Ry. ([1889], 177 U. S. 51, 44 L. ed. 667), 91, 436.
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- Finance Co. of Pennsylvania v. Trenton & N. B. Ry. Co. ([1911], 189 Fed. 282), 924.
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- French v. Commercial Bank (199 Ill. 213, 65 N. E. 252), 219.
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- Gay, *et al.*, v. Hudson River Electric Power Co. ([1910], 177 Fed. 1003), 596, 604, 606.
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- Grabee v. Moffit ([1907], 133 Iowa 54, 110 N. W. 142), 610.
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- Grissell's case ([1866], L. R. 1 Ch. App. 528), 382, 384, 389.
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- Halman v. Burlew ([1908], 198 Mass. 494, 85 N. E. 167), 707.

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- Havemeyer v. Superior Court ([1890], 84 Cal. 327, 24 Pac. 121), 613.
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- Hessler v. The Cleve Punch Co. ([1899], 61 O. S. 621, 56 N. E. 469), 924.
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- Holmes v. Holmes ([1878], 29 N. J. Eq. 9), 213.
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- Hughes v. Garrelts ([1913], 35 Okla. 321, 129 Pac. 43), 120.

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- Hughes v. Link Belt Mch. Co. ([1900], 95 Ill. App. 323), 536.
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- Ireland v. Nichols ([1870], 40 How. Pr. 85), 206.
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- Knight v. Plymouth ([1747], 3 Atk. 480), 862, 863, 864.
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- Lasere v. Rochereau ([1873], 17 Wall. 437, 21 L. ed. 694), 1151, 1154, 1157.
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- Lessee of Avery v. Pugh ([1939], 9 Ohio 67), 83, 662, 670, 672.
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- Long Dock Co. v. Mallery (1 Beasley's Rep., 12 N. J. Ch. 93), 53, 176, 178, 201, 296, 297.
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- McAffee v. Arnold & Mathis ([1908], 155 Ala. 561, 46 So. 870), 421.
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- McGill v. Brown ([1913], 72 Wash. 514, 130 Pac. 1142), 586, 809, 904.
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- Manchester & M. Ry. Co., *In re* ([1880], C. A. 14 Ch. D. 645), 17, 23, 253, 285.
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- Mathews v. McStea ([1870], 91 U. S. 7, 23 L. ed. 188), 1151, 1154, 1157.
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- Mercantile Trust Co. v. Kanawha ([1893], 38 Fed. 6), 646, 652, 653, 834, 856, 861, 888.
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[References are to pages]

- Merchants N. B. v. Chattanooga Const. Co. ([1892], 53 Fed. 314), 276.
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[References are to pages]

- Miller v. Lehman, Durr & Co. ([1888], 87 Ala. 579, 6 So. 361), 751.
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- Morrill v. Noyes ([1863], 56 Me. 463), 611, 816.
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- National E. Signalling Co. v. Telefunken W. Tel. Co. ([1913], 208 Fed. 679), 770.
- National Mercantile Agency, *In re* ([1904], 128 Fed. 630), 467.

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- National Nickel Co. v. Nevada Nickel Syndicate (112 Fed. 44), 1100.
- National S. & L. Bank of N. Y. v. M. N. Bk. of Newark ([1882], 89 N. Y. 440), 42.
- National Trust Co. v. Miller (33 N. J. Eq. 155), 485.
- Naumburg v. Hyatt ([1885], 24 Fed. 398), 32.
- Navan & Kings Court Ry. Co., *In re* ([1885], 17 L. R. Ir. 398), 285.
- Neate v. Duke of Marlborough ([1838], 3 My. & A. 407), 226, 227.
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- Nesbet v. Great Western Ry. ([1905], 41 Wash. 107, 63 Pac. 694), 690, 691.
- Nessler v. Industrial Land, etc. ([1903], 65 N. J. Eq. 491, 56 Atl. 711), 906.
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- Nevitt v. Woodburn ([1901], 190 Ill. 283, 60 N. E. 500), 32.
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- New Albany v. Burke ([1870], 11 Wall. 96, 20 L. ed. 155), 346, 351.
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- New Britain Mach. Co. v. Watt ([1915], Texas Civ. App., 180 S. W. 624), 690, 707.
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- Newell v. International, etc. ([1909], 169 Fed. 497, 152 Fed. 78), 648.
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- New England L. & T. Co. v. Young ([1890], 81 Iowa 732, 46 N. W. 1103), 9, 12, 913.
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- New York Ins. Co. v. Statham ([1876], 93 U. S. 24, 31, 32, 33, 35, 23 L. ed. 789), 1152.
- New York & N. J. Tel. Co. v. Metropolitan Tel. Co. ([1894], 81 Hun, 409), 80.
- New York & W. U. Tel. Co. v. Jewett ([1889], 115 N. Y. 166, 21 N. E. 1036), 31.
- New York, P. & O. R. Co. v. New York, L. E. & W. R. Co. ([1893], 58 Fed. 268), 290.
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[References are to pages]

Nichols v. Perry Patent Co. ([1856], 11 N. J. Eq. 126), 275.
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- Oliver v. Tonnes (2 Mart. La. [N.S.] 93), 499.
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- Parks v. Ross (11 How. 362, 13 L. ed. 730), 27.
- Parker, *In re* ([1879], 12 Ch. 293), 20, 140.
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- Pac. Coast Pipe Co. v. Conrad City Water Co. ([1917], 245 Fed. 846), 99, 281.

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- Parsons v. Sovereign Bank of Canada ([1912], Priv. Coun. App., 107 L. T. Rep. 575), 873, 874.
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- Pennsylvania R. B. v. Allegheny ([1890], 42 Fed. 85), 687.
- Pennsylvania Steel Co. v. New York City, etc. ([1914], 116 Fed. 458), 935.
- Pennsylvania Steel Co., *et al.*, v. New York City Ry. Co. [1908], 161 Fed. 787), 639, 640, 643, 644, 771, 804, 808.
- Pennsylvania Steel Co. v. New York Cent. Ry. ([1908], 163 Fed. 242), 640, 643, 652.
- Pennsylvania Steel Co. v. New York City Ry. Co. ([1908], 165 Fed. 477), 601, 640, 643, 934, 937.
- Pennsylvania Steel Co. v. New York City Ry. Co., *et al.* ([1910], 180 Fed. 514), 628.
- Pennsylvania Steel Co. v. New York City Ry. Co. ([1911], 187 Fed. 287), 737, 806.
- Pennsylvania Steel Co. v. New York City, etc. ([1912], 193 Fed. 286), 28, 916.
- Pennsylvania Steel Co. v. New York City Ry. Co. ([1912], 198 Fed. 721), 17, 19, 25, 28, 36, 314, 566, 594, 595, 597, 600, 602, 916.
- Pennsylvania Steel Co. v. New York City Ry. Co. (208 Fed. 168), 941.
- Pennsylvania Steel Co. v. New York, etc. ([1914], 216 Fed. 458), 939, 941, 964.
- Pennsylvania Steel Co. v. New York City Ry. Co. ([1915], 221 Fed. 440), 927.
- Penton v. Hall ([1913], 140 Ga. 576, 78 S. E. 917), 551.
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- People v. Bank of Danville ([1886], 39 Hun 190), 904.
- People v. Bank of Rochester ([1884], 96 N. Y. 32), 903.
- People v. Bank of Staten Island ([1911], 127 N. Y. S. 906), 880, 903.

[References are to pages]

- People v. Brooklyn Bank ([1908], 125 N. Y. App. Div. Rep. 354, 109 N. Y. S. 534), 95.
 People v. Brooklyn Bank ([1910], 126 N. Y. S. 155), 746.
 People v. Commercial Alliance Ins. Co. ([1897], 154 N. Y. 95, 47 N. E. 968), 591.
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[References are to pages]

- Pickering v. Richardson ([1910], 57 Wash. 117, 106 Pac. 614), 738, 801, 951, 963.
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[References are to pages]

- Post, etc., v. Railway ([1887], 144 Mass. 341, 11 N. E. 540), 381.
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- Quincy v. Railway Co. ([1891], 145 U. S. 82, 36 L. ed. 632), 17, 25.

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- Reid v. Explosives Co. ([1887], 57 L. T. 439, 19 Q. B. Div. 264), 585, 587, 873.
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- Robertson v. Howard ([1912], 229 U. S. 254, 57 L. ed. 1174, 33 S. Ct. R. 854), 392, 395, 399, 400, 401, 403, 404, 405, 406, 445, 472, 474, 475, 655, 678, 1099, 1100.
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- Ross v. Titsworth ([1883], 37 N. J. Eq. 333), 513, 811.
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- Ross Shoe Mfg. Co., *In re* ([1909], 168 Fed. 39), 464.
- Roszell Bros. v. Continental Coal Corp. ([1916], 235 Fed. 343), 404.
- Roth & Appel, *In re* ([1910], 181 Fed. 667), 442.
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- Russell v. Chicago T. & S. B. ([1890], 40 Ill. App. 385), 713.
- Russell v. Clark's Exrs. (7 Cranch 87, 3 L. ed. 271), 219.
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[References are to pages]

- San Antonio Gas Co. v. State (22 Tex. Civ. App. 118, 54 S. W. 289), 713.
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- Sands v. E. S. Greeley & Co. ([1898], 31 C. C. A. 424, 88 Fed. 130), 256, 257, 258, 476, 492, 493, 495, 496, 498, 660, 661, 966, 968.
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- Seaboard Nat. B. v. Slater ([1902], 117 Fed. 1002), 352, 355.
- Seagram v. Tuck ([1881], 18 Ch. D. 299), 892, 1039.

[References are to pages]

- Searle v. Choat ([1884], C. A. 25 Ch. D. 723), 831, 843, 844, 845, 846, 890.
- Seattle L. S. & E. Ry. Co., *In re* ([1894], 61 Fed. 541), 606, 875.
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- Shields v. Coleman ([1894], 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570), 95, 96, 503, 534, 979.
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[References are to pages]

- Shotwell v. Smith (3 Ed. Ch. 588), 174.
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- Smith v. Earl of Effingham ([1839], 2 Beav. 232), 57, 171, 890.
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- Spring v. South Carolina Ins. Co. ([1821], 6 Wheat. 518, 5 L. ed. 320), 203.
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- State, ex rel. Dauphin, v. Ellis*, Judge (108 La. 531, 32 So. 335), 46, 48, 55, 59.
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- Stewart v. Laberee ([1911], 185 Fed. 471), 80.
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- Texas & Pac. Ry. Co. v. Cox ([1891], 145 U. S. 597, 36 L. ed. 829, 12 S. C. Rep. 905), 31, 319, 322, 324, 327, 832, 833, 841, 844, 847, 855.
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[References are to pages]

- Tichbone v. Tichbone ([1869], L. R. 1 Pr. & Div. 733), 141.
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- Townley v. Sherbourne ([Charles I], Bridg. Rep. 35, Leading Cases in Equity, White & Tudor, Vol. II, pt. 2, p. 1738), 882.
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- Trans-Atlantic Co. v. Pietonie ([1860], 1 Johns. [English Report] 604, 6 Jur. [N.S.] 532), 70, 124, 201.
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- Turner v. Hudson (105 Me. 476, 75 Atl. 45), 429.
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- Union Lumber Co. v. Traverse City, etc. ([1912], 136 N. W. 463), 355.
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- United States v. Dominion Oil Co. ([1917], 241 Fed. 425), 46, 47, 124.
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- United States v. Fox ([1876], 94 U. S. 315, 24 L. ed. 192), 661, 1101.
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- Valentine v. Teller ([1825], 1 Hopk. 422), 685.
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- Waddell Entz Co., *In re* ([1896], 67 Conn. 324, 35 Atl. 257), 965.
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- Watson v. Merrill (136 Fed. 362, 69 L. R. A. 719), 442.
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- White v. Schloerb ([1899], 178 U. S. 542, 44 L. ed. 1183), 395, 396, 397.
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[References are to pages]

- Wills v. Luff ([1888], 38 Ch. D. 197), 227.
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- Wilshire Sern Co., *In re* ([1868], L. R. 3 Ch. App. Cas. 447), 583, 588.
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- Wisconsin Granite v. Gerrity (144 Ill. 77, 33 N. E. 31), 219.
- Wiswall v. Campbell ([1876], 93 U. S. 347, 23 L. ed. 923), 431.
- Wiswall v. Kunz ([1898], 173 Ill. 110, 50 N. E. 184), 17, 912, 915.
- Wiswall v. Sampson (14 How. 64, 14 L. ed. 322), 501, 543, 544, 550, 551, 554, 555, 564, 577, 773, 798, 801, 842, 889, 949.
- Wiswell v. Starr ([1862], 50 Me. 381), 970.
- Wolbert v. Harris (7 N. J. Eq. 621), 144.
- Wolf v. Carr, Parker & Co. ([1915], 31 T. L. R. 407), 1161, 1166.
- Wolf v. Lovering ([1908], 159 Fed. 91), 838, 859, 861.
- Wood v. Brown ([1866], 34 N. Y. 337), 135.
- Wood v. Dummer ([1824], 3 Mason, 308), 335, 336, 339, 343, 344, 346, 347, 366.
- Wood v. Ellis ([1888], 85 Va. 471, 7 S. E. 852), 734.
- Wood v. Guarantee Trust Co. (128 U. S. 416, 32 L. ed. 472), 637, 648.
- Wood v. Holab (80 Conn. 314, 68 Atl. 323), 742.
- Wood v. Oregon Dev. Co. ([1893], 55 Fed. 951), 974.
- Wood v. Parker (63 N. C. 379), 703.
- Wood v. Wood ([1834], 4 Paige 298), 156.
- Wood, *et al.*, v. Dummer ([1824], 3 Mason, 308), 332.
- Wood & Henderson, *In re* ([1907], 210 U. S. 246, 28 Sup. Ct. 621, 52 L. ed. 1046), 404, 405, 480.
- Woodruff v. Erie Ry. Co. ([1883], 93 N. Y. 624), 314, 315, 876.
- Woodruff v. Taylor ([1847], 20 Vt. 63), 656, 659, 665, 666, 682.
- Wormser v. Merchants Nat. Bk. ([1886], 49 Ark. 117, 4 S. W. 198), 73.
- Wren v. Kirton ([1805], 11 Ves. Jr. 380), 865.
- Wrexam, etc., *In re* ([1900], II Ch. D. 437), 285, 286, 850, 854.
- Wright, *In re* (32 Sol. J. 721), 132.
- Wright v. Alkys (1 V. & B. 313), 211.
- Wright v. McCormack ([1866], 17 O. S. 86), 337, 354, 365, 379.
- Wright v. Nostrand (94 N. Y. 31), 100.
- Wright v. Wright ([1913], 180 Ala. 343, 60 So. 931), 47, 162, 722.
- Wyman v. Knight ([1888], 39 Ch. D. 165), 542.

[References are to pages]

Wyman v. Bowman ([1904], 127 Fed. 257, 265), 370, 373, 374.
 Wyman v. Williams ([1897], 52 Neb. 833, 73 N. W. 285), 373.
 Wynne v. Lord Newborough ([1790], 1 Ves. Jr. 164), 615.
 Wynne v. Lord Newborough ([1808], 15 Ves. 284), 727.
 Wynn v. Newborough ([1790], 3 Bro. C. R. 88), 611, 871, 952.

Y

Yaryan Naval Stores Co., *In re* ([1914], 214 Fed. 563), 395.
 Yeiser v. Cathers ([1903], 97 N. W. 840, 5 Neb. [unof.] 204), 774.
 Yonckman-Walsh Fdry. Co., *In re* ([1909], 166 Fed. 381), 443.
 York Mfg. Co. v. Hoblitzell Nat. B. ([1912], 118 Md. 512, 84 Atl. 559), 878.
 Young v. Germania Savings Bank ([1909], 133 Ga. 699, 66 S. E. 925, 68 S. E. 321), 122, 158, 204.
 Young v. Hamilton ([1910], 135 Ga. 339, 69 S. E. 593), 91, 92, 93, 116, 154, 173, 177, 202, 507, 560, 763.
 Young v. Stevenson ([1899], 180 Ill. 608, 54 N. E. 562), 605.

Young v. United States ([1877], 97 U. S. 39, 24 L. ed. 992), 1148.

Z

Zacher v. Fidelity, etc. ([1901], 106 Fed. 593), 542, 570.
 Zeckendorf v. Steinfield ([1911], 225 U. S. 445, 56 L. ed. 1156, 32 S. Ct. Rep. 728), 261, 262.
 Zeigler Co., J. W., *In re* ([1911], 189 Fed. 259), 452.
 Zielian v. Baltimore Plate Ice Co. ([1911], 81 Atl. 22, 115 Md. 658), 653, 860, 878.
 Zieverink v. Kemper (50 O. S. 208, 34 N. E. 250), 381, 712.
 Zimmerman v. So Relle ([1897], 80 Fed. 417), 88.
 Zinc Corporation Ltd. v. Hirsh, C. A. ([1916], 1 K. B. 541, 85 L. J. K. B. 565, 21 Com. Cas. 273, 114 L. T. 222 [1916], W. N. 11, 32 T. L. R. 232), 1164.
 Zotti, *In re* ([1911], 186 Fed. 84), 407, 440, 441, 445.
 Zuber v. Micmac Gold Mine Co. ([1910], 180 Fed. 625), 51, 55, 113.
 Zwietusch v. Luhning ([1914], 156 Wis. 96, 144 N. W. 257), 677, 696.

Clark on Receivers

CHAPTER I

ORIGIN OF RECEIVERS

ANALYSIS

- § 1. Old Anglo-Saxon Law.
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 - (a) New York Chancery Courts.
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§ 1. Old Anglo-Saxon Law. The old Anglo-Saxon courts were open-air meetings of the freemen.¹ There were no professional lawyers, there were no judges, as we understand them, nor learned persons specially appointed to preside. The judgments of the courts proceeded from the meeting itself, not from the presiding officers, and were regularly preserved only in the memory of the suitors. This Anglo-Saxon court was bound to declare what was the law covering the questions involved, rather than in equity, honesty and good conscience to do full justice to the litigants. The Anglo-Saxon law

¹ The Expansion of the Common Law, Pollock 140.

sprang from the people and the courts declared what it was; on the other hand, the Roman law was scientifically developed and invented by highly educated and trained men.

In the primitive state of society obtaining in England prior to the advent of William the Conqueror, property consisted of land and the direct products of land,—timber, crops, cattle, etc. Most of the business in these primitive courts concerned these species of property. Title to land was ordinarily transferred by the concrete act of going upon the land itself and delivering seisin; personal property was generally transferred by manual delivery before witnesses. Abstract ideas of property and equitable titles known to the Roman law and afterwards adopted under chancery and equity practice were then unknown and undeveloped.

The open-air courts of the Anglo-Saxons were most impersonal and had little or no machinery to enforce their judgments. It is therefore hard to conceive of these courts exercising what we now know as equity jurisdiction, or of holding and preserving property for litigants or doing anything analogous to or exercising a jurisdiction in what is now known as receiverships, and nothing of the kind is found in any of the old Anglo-Saxon reports extant and available today.

§ 2. Norman Influence on Old Anglo-Saxon Law. When William the Conqueror established his hold upon England, a more centralized government was ushered in. The king became the head of the administration. The highest court in the land was the curia regis or king's court, which gave sentence among the barons themselves. The king himself often sat in this court which always attended his person. He there heard causes and pronounced judgment, and though he was assisted by the advice of the other members, it is not to be imagined that a decision could easily be obtained contrary to his inclination or opinion. In the king's absence, the chief justiciary presided, who was the first magistrate in the state and a kind of viceroy on whom depended all the civil affairs of the king-

dom. This *curia regis*, or king's court, sometimes called the court of exchequer, judged in all causes, civil and criminal, and comprehended the whole business which is now shared out among four courts,—the chancery, the king's bench, the common pleas and the exchequer,² or subsequently "The Supreme Court of Judicature."

This accumulation of powers rendered this one court most formidable to all the subjects. In addition, William the Conqueror ordered all pleadings to be in the Norman tongue. Law now became a science which at first fell entirely into the hands of the Normans and which, even after it was communicated to the English, required so much study and application that the laity in those ignorant ages were incapable of attaining it, and law was a mystery almost solely confined to the clergy and chiefly to the monks. In the Saxon times no appeal was received in the king's court except upon the denial or the delay of justice by the inferior courts, but William the Conqueror empowered his court to receive appeals, not only from the inferior courts but from the courts of barony. Furthermore, the king established itinerant judges who made their circuits throughout the kingdom and tried all causes that were brought before them. By this expedient the courts of barony were kept in awe, and as the freeholders were found ignorant of the intricate principles and forms of the new law, the lawyers gradually brought all business before the king's judges and abandoned the ancient simple and popular judicature.³

The king, now supreme, is at the head of practically all the courts in England, and the law of England passes under the domain of a system of writs which flow from the royal chancery.⁴ The king, at the instance of complainants, issued writs which either bade their adversaries appear in the royal court to answer the complaint or else committed their causes to the court of the sheriff or of the feudal lord and commanded that rights should be done to them in the county court

² Hume's History of England, Vol. I, p. 458.

³ Hume's History of England, Vol. I, p. 460.

⁴ History of English Law P. & M., Vol. II, p. 556.

or in the seignorial courts. As the king's interference becomes more frequent and more as a matter of course the work of penning such writs naturally falls into the hands of subordinate officers who follow precedents and copy blank forms. A classification of writs is the outcome. Some are granted as a matter of course and are called *brevia de cursu*. This procedure furnishes a fixed number of "forms of action," which are the bases of what are now known as common-law actions. Every remedial right must be enforced through one of these forms and if the facts of a particular case are such that none of the forms of action is appropriate, the injured party is without any ordinary legal remedy and his only mode of redress is by an application made directly to the king, the source of all justice.

§ 3. Origin of Chancery Jurisdiction. King William, the Conqueror, when he had established his grip on the courts of England (or his chamberlain, often called chancellor, acting in the name of the king), was called upon to dispense justice to suitors who had not been able to secure full redress under the old ordinary writs, which preceded and developed into the common-law forms of action as we know them today. Access to the king or his chancellor was only for extraordinary cases, "for no man was to apply to the king in any suit unless he at home might not be law worthy or could not obtain law." By "at home" was meant the local courts, whether the manor or the county. Thus a regular practice of hearing cases developed before the chancellor which practically was not restricted within the purview of the writs or forms of actions just mentioned, nor within the narrow limitations and formal procedure and remedies of the common law as declared by the ordinary king's judges when cases were brought before them under the writs.

The practice of appealing directly to the king or his chamberlain grew quite common and finally King Edward III, in the twenty-second year of his reign, by a general writ, ordered

that all such matters as were of grace should be referred to and dispatched by the chancellor or by the keeper of the privy seal. This was a formal declaration of the existence of the chancellor's court and of the distinction between its jurisdiction and procedure and the jurisdiction and procedure of the ordinary king's courts or common-law courts.

The king's chancellors were chosen from the *curia regis*, or king's court, which was made up largely of barons and ecclesiastics. The chancellors came mainly from the ecclesiastics, however, for they were the only educated and lettered men of the kingdom. These ecclesiastics were, by reason of their adherence to the church of Rome, necessarily well versed in the Roman law, and it was not until the reign of Edward III, when the king refused to pay tribute to the pope, that the Roman law fell under the common aversion. It therefore happened that the early chancellors when they dispensed justice to those who had not been able to secure it from the ordinary king's judges, either consciously or unconsciously, drew on the Roman law with which they were more or less familiar, and adopted much of that law into that system of justice which the chancellors dispensed and which we now term equity jurisdiction.

The rules of common law were supposed to have been established from time immemorial and the procedure was rigid and inflexible. Not so the procedure before the chancellors. The usages and rules of equity were invented,⁵ altered, improved and refined from time to time by the chancellors themselves, to suit conditions as they presented themselves, and have from time to time been altered, changed and improved. The principles upon which the chancellor was to base his decision in controversies arising within the extraordinary jurisdiction there conferred upon him were honesty, equity and good conscience. In order to advance justice the chancellors invented the procedure of appointing a receiver over the prop-

⁵ In *re Hallett's Estate* (1879), 13 Ch. D. 697, at 710.

erty of one person, on a proper case being made out when the remedy afforded by the ordinary court was not adequate.⁶ DeLolme says,⁷ "Of the courts of equity as established in England * * * the following definition may be given, which is that they are a kind of inferior experimental legislature continually employed in finding out and providing new species of cases for which the legislature have as yet found it convenient or practicable to establish any; in doing which they are to forbear to interfere with such cases as they find already in general provided for."

§ 4. Origin of Court Receivers in England. It is impossible to tell exactly when the first court receiver was appointed, but following the practice of granting injunctions to stay waste and preserve property, which was quite common during the reign of Elizabeth,⁸ cases readily presented themselves wherein the remedy of enjoining the party in possession from committing waste or doing harm to the property was not sufficient protection. In other words, the court at times was doubtful whether or not the party in possession of property, or collecting the rents and profits of the same, could or would properly obey the injunction and physically protect the property and the rents and profits for those ultimately entitled to receive it or them. If the injunction was not heeded the party disobeying might be punished but the punishment would not restore property irreparably destroyed or lost. The property, if funds, was ordered paid into the court, if personal property other than money, or if real property, it could not be paid into court. The court itself could not physically care for the property and therefore appointed an officer of the court to act for the court. The practice first developed in England of

⁶ *Hopkins v. Worcester Canal L. R.*, 6 Eq. 447; *Cupit v. Jackson*, 13 Pri. 734.

⁷ *Const. of Eng.*, DeLolme, London ed., 1817, p. 148, cited in *Mas-*

sey v. Camden & Trenton Ry. Co. (1911), 78 N. J. E. 539, at 542, 80 Atl. 557.

⁸ *Moore's Reports* (1688), p. 554; *Pasch 41, Elizabeth.*

protecting real estate for the benefits of remaindermen and of infants as against those in possession. The real estate itself was not taken into possession by the receiver, but the fruits of the real estate, namely the rents and profits, were collected by the receiver and held by him subject to the orders of the court. The term sequestrator of the rents and profits frequently was used to designate the officer appointed by the court. The term sequestrator and receiver today, although of somewhat the same meaning, can not always be used interchangeably.

The appointment of sequestrators and receivers of rents and profits was very common in the reign of Elizabeth.⁹ In the case of *The Duchess of Marlborough, et al., v. The Duke of Marlborough*,¹⁰ decided between 1740 and 1741, Lord Hardwick ordered the then duke to have possession of the estate and said if certain annuities were not paid, the court could appoint a receiver. Many other cases are found in the early reports where receivers were appointed over the property, both real and personal, of infants, and other wards of the chancery court. In England the appointment of receivers was, until very recently, confined to courts of chancery. However, the Judicature Act of 1873¹¹ extended the jurisdiction to appoint a receiver to all divisions of the high court, to the court of appeals, and to every inferior court having jurisdiction in equity, or at law and in equity, and the admiralty respectively, as regards all causes of action within their jurisdiction.

§ 5. Origin of Chancery Jurisdiction and Receivers—American Colonies. During the colonial period equity jurisprudence and likewise receiverships practically did not exist in New England.¹² Even after the Revolution, equity powers were given to the courts with some reluctance.¹³ In New York

⁹ *Equitable Jurisdiction of the Court of Chancery*, Spence, Vol. I, p. 673 (old).

¹⁰ *Barnardiston's Reports* (1740-1741), p. 69.

¹¹ 36 and 37 Vic. C. 66.

¹² *Dane Abridg.*, ch. 1, art. 7, par. 50; also 7 *Dane Abridg.*, ch. 225, art. 62.

¹³ 2 *Swift Dig.*, p. 15, ed. 1823.

the first court of chancery was established in 1701, but was so unpopular from the fact that the powers were vested in the governor and council that it had very little business until it was reorganized in 1778.¹⁴ In New Jersey a chancery court was established in 1705.¹⁵ In Pennsylvania there was no permanent establishment of a court of equity during the colonial days.¹⁶ In Virginia a chancery court was established about 1700.¹⁷ In the Carolinas and Georgia, before the Revolution, general power of chancery was exercised by the executive.¹⁸ In Maryland some chancery powers were exercised under the charter.¹⁹

§ 6. Origin of Chancery Jurisdiction and Receivers—United States Courts. The Constitution of the United States provides that the judicial powers of the federal government shall extend to all cases at law and in equity arising under the constitution and laws of the United States and treaties made or which shall be made under their authority.²⁰

In 1789 the first United States judiciary act was passed providing generally for the organization and administration of the federal courts. The sixteenth section of this act provided that suits in equity shall not be sustained in any case where a plain, adequate and complete remedy can be had at law, thus merely declaring a rule and usage of equity which had been adopted and laid down by the English courts of chancery long before, and thus indicating the general tenor of the federal legislature at that time as willing to adopt English precedents in chancery. We say at that time because we have shown when describing the origin of chancery and receiverships in the colonies and early states that the early colonists were very slow in creating chancery courts or chancery juris-

¹⁴ 1 Johnson Ch. Rep., preface.

¹⁵ 1 Fonbl. Equity, by Laussat, ed. 1831, p. 14, note.

¹⁶ Essay on Equity in Penn. (1826), Laussat.

¹⁷ 3 Tucker's Black Anal. 7.

¹⁸ Fonbl. Equity, p. 14; 7 Dane Abr., ch. 225, art. 1.

¹⁹ 7 Dane Abr., ch. 225, art. 1.

²⁰ Const. of U. S., art. III, sec. 2.

diction, believing they were not proper and safe courts for democratic peoples, concentrating too much power in one or a few men. The United States Practice Act of 1792²¹ substantially repeated the same provisions as the act of 1789, and the United States Supreme Court about that time promulgated the following rule:

“In all cases where the rules prescribed by this court or by the circuit court do not apply the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules but as furnishing just analogies to regulate the practice.”²²

The United States Supreme Court and the Circuit Courts of Appeals and the Circuit Courts of the United States sitting in equity have the full jurisdiction of the English courts of chancery as they existed at the time of the adoption of the Constitution of the United States.²³ Since the appointment of receivers by the chancery court of England dates back to the reign of Queen Elizabeth, which, of course, preceded the adoption of the United States Constitution, it follows that the power of the federal courts to appoint receivers dates back to the inception of our federal courts and their power to appoint receivers is based on precedents dating back to the time of Queen Elizabeth.

§ 7. Origin of Chancery Jurisdiction and Receivers—Original States. After the separation of the American colonies from the British crown, and the entrance into the Union of the thirteen original states, the constitutions of many of these states provided for the establishment of courts of chancery after

²¹ U. S. Stat. at Large, Vol. I, p. 276, also U. S. R. S., sec. 913.

²² Supreme Court Equity Rule No. 90. See new Equity Rules explained in this work, Vol. II, ch. XXXIV, *infra*.

²³ *Underground Elec. Rys. Co. v. Owsley*, 176 Fed. 28. See new Equity Rules explained in this work, Vol. II, ch. XXXIV, *infra*.

the model of the high court of chancery in England. Such was the case in New York, New Jersey, Maryland, Delaware, South Carolina and Virginia.

· **(a) New York Chancery Courts.** The most important chancery court of the early states of the Union was the chancery court of New York organized in March, 1778, under the first constitution of the state. Robert Livingston was the first chancellor, John Lansing, Jr., the second, and James Kent, the third; his work as chancellor beginning February 25, 1914. For all practical purposes chancery jurisdiction in the United States begins with Chancellor Kent, whose decisions are reported in Johnson's Ch. Reports (N. Y.). These are the first chancery reports in America now readily available to the practitioner and they together with the New York chancery reports which directly follow are rich in cases of receivership and cite many English precedents. These early New York chancery reports are frequently quoted by the Supreme Court of the United States and other courts. Chancery courts as distinct and independent tribunals existed in New York until 1823, when equity powers were withdrawn from the chancellor and partially vested in the circuit judges as vice-chancellors and in an assistant vice-chancellor in the city of New York, and the circuit judges, except in the city of New York, exercised in distinct capacities a mixed jurisdiction of law and equity. This situation existed in New York until the New York Civil Code was enacted in 1850. This code in general abolished the formal distinction between actions at law and suits in equity and abolished chancery courts as such. It did not, however, abolish equity or chancery jurisdiction but gave it to other courts, neither did it abolish any of the chancery or equitable remedies which existed prior to the code.

(b) New Jersey Chancery Courts. The first constitution of the state of New Jersey established a chancery court distinct from other courts. This court has remained as such until today.

(c) **Maryland Chancery Courts.** This state originally adopted the system of having a chancery court separate and apart from so-called law courts. The chancery courts as such were abolished in 1854 yet the two departments of law and equity are still maintained distinct in their rules and procedures and in their powers of actions, but the jurisdiction to administer both systems of jurisprudence is possessed and exercised by the same tribunal which in one case acts as a court of law and in another as a court of equity. Maryland uses the same system of mixed procedure as the United States courts and has not yet adopted the so-called code system of pleading and practice.

(d) **Delaware Chancery Court.** Such a court was provided for in the first constitution of Delaware, established in 1792, and has existed ever since as an independent tribunal.

(e) **South Carolina Chancery Court.** This court was established by the first constitution of that state in 1784, as a separate and distinct tribunal under the English chancery court model. The decisions of these early South Carolina chancellors are considered very strong. This court has remained a separate tribunal until today.

(f) **Virginia Chancery Court.** In 1791, a high court of chancery was organized in Virginia, with a single judge. This one judge and one tribunal was not sufficient, and in 1802 three superior courts of chancery, one for each great district, were established. Later on the chancery courts as such were abolished and chancery jurisdiction given to the so-called law tribunal, practically establishing the same system as has always obtained in the United States courts.

§ 8. Some Original States without Chancery Courts. As early as 1823 equity jurisdiction was well established in the courts of New England, namely in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island and Connecticut, but it was not vested in separate chancery courts. The jurisdiction of law and equity was vested in the same so-called law tribunal,

yet the chancery proceedings were kept distinct both in form and substance from the law proceedings and carried on by bill and answer generally, under the English model. In Pennsylvania, there was never any distinct chancery court, neither is there today. This state not only did not have any chancery court as such but did not adopt or use any chancery forms. The judges were sworn to do equal rights and justice to all men to the best of their judgment and abilities, according to the law,²⁴ and yet as early as 1818 it was held that courts of law in Pennsylvania adopt the principles of a court of equity.²⁵ In other words, chancery was administered in Pennsylvania through common-law forms. For instance, equity is administered in an action in ejectment.²⁶ Such a system seems at variance with all recognized rules of equity practice and procedure. Pennsylvania finally recognized the incongruity of such a practice and beginning in 1836, the assembly has, from time to time, passed various acts providing for full separate chancery powers, according to the mode of procedure in use in the English court of chancery, to be conferred on the courts of Pennsylvania and prescribing suitable forms of procedure.

North Carolina. The superior courts of the state administered both law and equity and the law and equity cases date back to 1789.

§ 9. Origin of Chancery Jurisdiction and Receivers in Admitted States. It is impossible in this work to review the history and origin of chancery jurisdiction and incidentally receiverships in all the admitted states of the Union. Most of these states generally started out with a mixed jurisdiction of law and equity conferred on certain of their courts. Michigan, in 1835, established a separate court of equity with plenary powers and jurisdiction, and a chancellor to hold his court

²⁴ Pollard v. Shaffer, 1 Dal. (Pa.) 213.

²⁶ Church v. Ruland (1870), 64 Pa. 434.

²⁵ Jordan v. Cooper (1818), 3 Serg. & R. (Pa.) 585.

of chancery in the general circuits in which the state was divided with equity appellate jurisdiction in the supreme court. Subsequently in 1845 the chancellor and separate chancery court were abolished and Michigan went back to the so-called mixed system. In 1839 Alabama established separate courts of chancery and they still exist as such.

Mississippi and Tennessee also have chancellors and chancery courts.

§ 10. Origin of Chancery Jurisdiction and Receivers in Code States. About the middle of the last century there developed throughout the country a demand for simpler and more modern proceedings before the courts, for many a litigant having a meritorious case often found himself thrown out of court not because he was not entitled to relief, but because his lawyer had mistaken the proceeding most fitting. The non-elasticity of the non-code procedure was considered one of the most flagrant defects.

In 1848, in New York state, a commission was appointed by the legislature to report a code of procedure. This code was drafted and adopted as the civil code of New York in 1850. Following New York, pioneer in code making came Missouri, Indiana, Kentucky, Ohio, with their codes more or less resembling the New York code. Subsequently the following code states either changed from the old mixed system of jurisprudence or originally adopted the code system: Arizona, Arkansas, California, Colorado, Connecticut, Dakota, Iowa, Kansas, Minnesota, Missouri, Nebraska, Nevada, North Carolina, Oregon, Ohio, Oklahoma, South Carolina, Washington, Wisconsin, Wyoming and Utah.

All the codes generally speaking follow the same lines. The codes do not abandon the chancery tribunal in substance even if they do in form, but break down the distinctions in form between law and equity procedure and as far as possible and expedient modify the two systems of practice and form them into one. More than this they do not do—they do not impair

or affect rights as heretofore recognized either at law or in equity nor do they lessen the extent of relief heretofore granted, but it is the aim of the codes to grant just so much relief as before. What the codes do is to require all the relief legal and equitable formerly sought by the various actions at law and suits in equity to be thereafter sought by commencing every suit for it in the same way.²⁷

The entire mass of remedial justice, all that portion of it which had been administered in courts of law and all that portion of it which had been administered in courts of chancery, is to remain, but be administered by a different form of procedure. The common law is to be as it had been and so of equity. They are to stand to each other on the same relations and their peculiar relief is to be invoked in the same cases as before.

The former powers of courts having equity powers to appoint receivers was continued under the codes.²⁸ Yet many of the codes contained and still contain special provisions indicating what courts and when receivers may be appointed. These provisions often contained and contain today in addition, a paragraph providing for the appointment of a receiver "in all other cases in which receivers heretofore have been appointed by the usages of equity."²⁹

It is therefore generally true that courts of general equity jurisdiction with, or without, a code, have inherent power to appoint receivers. What the statutes under the codes do, if anything, is possibly to slightly enlarge the field for receivers; at any rate the statutes have seldom limited it.

²⁷ Report of commissioners who prepared the Ohio Civil Code of 1853.

²⁸ Ohio Civil Code (1853), sec. 253, subsec. 9; Code 1910, sec. 11894.

²⁹ Ohio Civil Code (1853), sec. 253, subsec. 6; see Ohio Gen. Code (1910), sec. 11894, subsec. 6.

CHAPTER II

NATURE OF RECEIVERS

ANALYSIS

§ 11. Definition of Receivers.

- (a) Receivers Appointed by the Court.
- (b) Receivers Appointed Out of Court.

§ 12. Kinds of Receivers Appointed by the Court.

- (a) Equitable Receivers.
- (b) Chancery Receivers.
- (c) Pendente Lite Receivers.
- (d) Temporary Receivers.
- (e) Permanent Receivers.
- (f) Interim Receivers.
- (g) Receivers in Bankruptcy Proceedings.
- (h) Syndic.
- (i) Receiver under Creditor's Bill.
- (j) Receiver by Way of Equitable Execution.
- (k) Receiver in Supplementary Proceedings.
- (l) Receiver in Proceedings in Aid of Execution.
- (m) Statutory Receivers.
- (n) Statutory Receivers, So-Called.
- (o) Manager or Receiver and Manager.
- (p) Liquidator.
- (q) Receiver after Dissolution of Corporation.

§ 13. Kinds of Receivers Appointed Out of Court.

§ 14. Receiver an Officer of Court.

§ 15. Receiver a Representative of the Court.

§ 16. When Receiver is Agent of the United States or of the State.

§ 17. Receiver Not Strictly Agent of Court.

Cases Holding Receiver is Agent of Court.

§ 18. Receiver Not Agent of the Parties to the Suit.

Cases Holding Receiver Agent of the Corporation Defendant.

§ 19. Receiver More a Principal than Agent.

- (a) English Doctrine: Receiver Being Principal to Contract.
- (b) American Doctrine: Receiver's Liability Official in Contract and Tort.

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- § 38. When Appointment of Receiver Amounts to an Equitable Lien.
- § 39. Appointment of Receiver More than a Sequestration.
Receivership More like Sequestration than Execution.
- § 40. Distinction between Sequestration and Appointment of Receiver.
- § 41. Distinction between Execution and Appointment of Receiver.
- § 42. Distinction between Attachment and Appointment of Receiver.

§ 11. **Definition of Receivers.** Receivers as known to the law may for the purpose of definition be divided into those appointed by the court and those appointed out of court.

(a) **A Receiver Appointed by the Court** is a person who by such appointment becomes an officer of the court to receive, collect, care for and dispose of the property or the fruits of the property of another or others.¹ A receiver appointed by a court is an arm² or hand³ of the court, an officer⁴ of the court, a representative⁵ of the court, and of all the parties in interest in the litigation wherein he is appointed.⁶ The court itself has the care of the property in dispute, the receiver is but its creature. He is subject to the court's directions and orders and in the discharge of his official duties is at all times entitled to apply to the court for instructions.⁷ After the appointment of the receiver the relation of the receiver and the original defendant or owner is that of caretaker and owner.⁸

¹ *Booth v. Clark*, 17 How. (U. S.) 322, 331, 15 L. ed. 164; *Spring Valley v. City and County* (1915), 225 Fed. 728, 731; see *Viner's Abridgement*, Vol. XVIII, p. 160; *In re Manchester & M. R. Co.* (1880), C. A. 14, Ch. D. 653; *Atlantic Trust Co. v. Chapman*, 208 U. S. 360, 371, 28 Sup. Ct. R. 406, 409, 52 L. ed. 528, 13 Ann. Cas. 1155; *Spring Valley W. Co. v. City and County of San Francisco* (1915), 225 Fed. 728, at 731.

² *Dietrich v. O'Brien* (1913), 122 Md. 482, 89 Atl. 717; *Coy v. Title Guarantee & Trust Co.* (1912), 198 Fed. 275; *Metropolitan T. Co. v. N. C. L. Co.* (1908), 162 Fed. 170, at 179.

³ *People, ex rel. Attorney General, v. Security Life Ins. Co.*, 79 N. Y. 267, at 270; *Bull v. International Power Company* (1916), 86 N. J. Eq. 275, 98 Atl. 382.

⁴ *Stuart v. Boulware* (1889), 133 U. S. 78, 33 L. ed. 568; also *Pennsylvania Steel Co. v. New York* (1912), 198 Fed. 721, at 728; also *Porter v. Sabine*, 149 U. S. 473, at 479, 37 L. ed. 815; also *Davy v. Searth* (1906), 1 Ch. 55; also *Platt*

v. Beach (1868), 2 Ben. 318; also *Booth v. Clark* (1854), 17 How. 321, 15 L. ed. 164; also *Quincy v. Railway Co.* (1891), 145 U. S. 82, at 97, 36 L. ed. 632; also *Union Bank v. Kansas City Bank* (1889), 136 U. S. 223, at 236, 34 L. ed. 341; also *Atlantic Trust Co. v. Chapman* (1907), 208 U. S. 360, at 371, 52 L. ed. 528; *Weeks v. Weeks*, 106 N. Y. 626, 13 N. E. 96; *Bull v. International Power Co.* (1916), 86 N. J. Eq. 275, 98 Atl. 382.

⁵ *Davis v. Gray* (1872), 16 Wall. 203, 21 L. ed. 447.

⁶ *Weeks v. Weeks*, 106 N. Y. 626, 13 N. E. 96; *People, ex rel. Attorney General, v. Security Life Ins. Co.*, 79 N. Y. 267, at 270; *Bull v. International Power Co.* (1916), 86 N. J. Eq. 275, 98 Atl. 382.

⁷ *Corey v. Long* (1872), 12 Abb. Prac. Rep. (N.S.) 427; *Cammack v. Johnson*, 2 N. J. Eq. 163; *Bull v. International Power Co.* (1916), 86 N. J. Eq. 275, 98 Atl. 382.

⁸ *Patterson v. Gas Light & C. Co.*, 2 Ch. D. (1896), C. A. 476, at 483; see *Wiswall v. Kunz* (1898), 173 Ill. 110, at 111, 50 N. E. 184.

(b) **A Receiver Appointed Out of Court** is a person who receives, collects, cares for and disposes of the property of another or others in accordance with an agreement made between persons having interests in such property⁹ or by reason of a power expressed in a mortgage¹⁰ or by reason of the nineteenth section of the English Conveyancing Act of 1881,¹¹ which authorizes such a receiver without a power expressed in the mortgage.¹²

Receivers appointed out of court are rare in America.

§ 12. Kinds of Receivers Appointed by the Court. (a) **Equitable Receivers**, so-called, are those which are appointed by chancery courts and courts of general equity jurisdiction under the usages and rules of equity calling for such appointment. Also those receivers appointed by other courts which have not general equity jurisdiction but have statutory power authorizing such appointment. Most states have statutes indicating in what cases ordinary or equitable receivers will be appointed and by what courts. These statutes in the main either codify the usages and rules of equity covering receivers, slightly modify them, or at times enlarge them. Such statutes, however, do not as a rule make such receivers any less equitable receivers.

The terms, equitable receiver, chancery receiver, and pendent lite receiver, are often used interchangeably.

(b) **Chancery Receivers.** The term chancery receiver is applied to a receiver appointed by a chancery court, yet the term may also be applied to a receiver appointed under the equitable powers given by statute to a court which is not strictly a chancery court. The term may also be applied to a receiver appointed by a code state court, which combines equitable and common-law practice under the one form of civil

⁹ *Prior v. Bagster* (1888), 57 L. T. 761.

¹¹ 44 and 45 Vic. c. 41.

¹⁰ *Houldsworth v. Yorkshire* (1903), 2 Ch. 284.

¹² *In re Della Rocella's Estate* (1892), 29 L. R. Ir. 464, at 467.

action. Such a court, although it uses a code of civil procedure, nevertheless applies chancery or equitable remedies. The term chancery receiver in its generally accepted sense, means an officer appointed by the court to hold property in litigation pending suit, or at times to hold property after judgment, deriving his authority from the court and not from the parties at whose instance he is appointed. Being a mere holder and caretaker of the property, his appointment does not change the title to the property in his charge, nor alter any lien or contract.¹³

(c) A Pendente Lite Receiver is an equitable receiver and as the term implies is a receiver during the pendency of the action. After a case has gone to judgment it is no longer, strictly speaking, a pending action. A receiver is often appointed "after judgment," "to preserve the property pending appeal." Such a receiver is often by the statutes called a receiver pendente lite, which term in such case is, strictly speaking, a misnomer. He is at any rate an equitable receiver and the usages and rules of equity pertaining to equitable receivers apply generally to these receivers after judgment.

(d) A Temporary Receiver is one appointed temporarily, as the term indicates, for the purpose of preserving the property until the rights of the parties to have a receiver could be ascertained or determined,¹⁴ or the necessity of a permanent receiver could be made certain to the court. A temporary receiver is frequently appointed without notice.¹⁵ An order appointing a temporary receiver may contain a time limit.¹⁶ The statutes of New York make special provision for the appointment of a temporary receiver with or without notice as the court thinks proper.¹⁷

¹³ See definition in *Pennsylvania Steel Co. v. New York City Ry. Co.* (1912), 198 Fed. 721, at 728.

¹⁴ *Nusbaum v. Locke* (1893), 53 Ill. App. 242, at 244; *Burroughs v. Toxaway Co.* (1910), 182 Fed.

129, at 137; *Farmers L. & T. Co. v. Cape R. R.* (1894), 62 Fed. 675 (1917), 245 Fed. 127.

¹⁵ *Huff v. Bidwell* (1907), 151 Fed. 563, 81 C. C. A. 43.

¹⁶ *Farmers L. & T. Co. v. Cape F. R. R.* (1894), 62 Fed. 675.

¹⁷ New York Civil Code, sec. 714.

(e) **Permanent Receivers.** A permanent receiver, as the term indicates, is a receiver appointed for the full term of the litigation. He may preserve the property as does a temporary receiver and he may in addition realize and distribute the property as the court directs.¹⁸ A permanent receiver may sometimes, but seldom, be appointed without notice, in which event it behooves the complainant, when asking the court to make such an appointment, to make a full, frank and complete statement of the facts upon which it is asked to exercise this extraordinary power.¹⁹

(f) **Interim Receivers.** The term, interim receiver, is mainly used in England and means a receiver for the time being until a permanent receiver is appointed.²⁰ He may be appointed without giving security,²¹ in which event the party at whose instance he is appointed is responsible for the receiver's receipts.²² Such term is applied to a receiver of an estate of a deceased person when there is delay in taking out letters of administration.²³

(g) **Receivers in Bankruptcy Proceedings.**²⁴ A receiver in bankruptcy is a temporary custodian of the property of the debtor against whom bankruptcy proceedings have been instituted or who has voluntarily come into court and asked to be adjudicated a bankrupt. Courts of bankruptcy have general equity powers to appoint receivers,²⁵ yet both the United States²⁶ and English bankruptcy acts²⁷ provide specifically for the appointment of a receiver in bankruptcy proceedings.

¹⁸ *Burroughs v. Toxaway Co.* (1910), 182 Fed. 129, at 137.

¹⁹ *Burroughs v. Toxaway Co.* (1910), 182 Fed. 129, at 136.

²⁰ *Taylor v. Eckersley* (1876), C. A. 2 Ch. D. 302.

²¹ *Taylor v. Eckersley* (1876), C. A. 2 Ch. D. 302.

²² *Morrison v. The Skerne Iron Works Co., Ltd.* (1889), 60 L. T. 588.

²³ *In re Parker, deceased* (1879), 12 Ch. D. 293.

²⁴ See chap. XVII this book.

²⁵ *Balke, Moffett & Towne v. Francis*, 89 Fed. 691; *In re Fixin & Co.* (1899), 96 Fed. 748, at 753.

²⁶ U. S. Bankruptcy Act (1898), sec. 2, clause 3 et seq.

²⁷ English Bankruptcy Act of 1883, 66 (1), Act of 1914, 7 et seq.

(h) **Syndic.** It was early held that a corporation could not act as an executor or administrator because it could not take the necessary oath. This technicality was evaded by the corporation naming an agent called a "syndic" to whom letters were issued.²⁸ The term "syndic" as used by the law of Louisiana is applied to one selected or appointed by the creditors of an insolvent to administer his estate. He may be chosen to administer the estate of an insolvent, if alive, or to administer the "succession" of an insolvent decedent.²⁹ He corresponds very nearly to the trustee in bankruptcy under the bankrupt laws of the United States.³⁰

There are two kinds of syndics. "The definite syndic is in a sense the agent of the creditors, but the provisional syndic is at best an officer of the court. He has no vested right to the position, but holds it subject to the pleasure of the judge in so far as he himself is individually concerned."³¹ A "provisional syndic" is analogous to a receiver in bankruptcy; a "definite syndic" is analogous to a trustee in bankruptcy.

(i) **Receiver under Creditor's Bill.** A receiver is frequently, in America, appointed under a judgment creditor's bill. Such an appointment corresponds with the appointment of a "receiver by way of equitable execution," as the term is used in England. The purpose of the appointment of a receiver under a creditor's bill is to realize the property of the defendant and apply it to the judgment creditor's claim. Such a receiver may be appointed for the additional purpose of preserving the property from loss³² and in such cases the receiver may ever be appointed before answer.³³

(j) **Receiver by Way of Equitable Execution.** A receiver after judgment to realize the property of the defendant and

²⁸ Minnesota L. & T. Co. v. Beebe (1889), 40 Minn. 7, 41 N. W. 232.

²⁹ Merrick's Revised Civil Code of Louisiana, art. 1224 et seq.

³⁰ See Einer v. Beste (1862), 32 Mo. 240, at 245.

³¹ State, ex rel. Mauberret Syndic, v. Judge (1893), 45 La. An. Rep. 235, at 240, 11 So. 862.

³² Nartzik v. Ehman (1914), 191 Ill. App. 71, at 80.

³³ Nartzik v. Ehman (1914), 191 Ill. App. 71, at 80.

apply it to the judgment is sometimes called a receiver by way of equitable execution. Such a receiver is an equitable receiver. The term receiver by way of equitable execution is an English term but sometimes used in America. Such a receiver is generally secured by a judgment creditor when he can not realize his judgment by ordinary legal methods. A judgment creditor, in America, in the federal courts and in those states which do not by statute provide for proceedings in aid of execution or for supplementary proceedings and for receivers therein, brings his creditor's bill and if entitled to a receiver has one appointed and predicated on the creditor's bill. Such a receiver is by way of equitable execution.

(k) A Receiver in Supplementary Proceedings is the term used and the statutory way under the New York code and other codes of accomplishing what is ordinarily accomplished by a creditor's bill with receiver.

(l) A Receiver in Proceedings in Aid of Execution is the term used and is the statutory way, under the Ohio and other codes, of accomplishing what is ordinarily accomplished by a creditor's bill with receiver. Such receivers are really equitable receivers, even though authorized by statute.

(m) Statutory Receivers, as distinguished from equitable receivers, are those who are purely the creatures of statutes and without which statutes no receiver could be appointed, even by a chancery court or court having general chancery jurisdiction. The only true statutory receivers are liquidators, as the term is used in England, who are given power by the laws of England and by the laws of our own states, to wind up a corporation after it has been dissolved. The powers of these receivers are generally set out at length by the statutes creating them. Most, if not all, other receivers appointed by statutes are really equitable receivers, the statutes only defining such receivers, indicating what courts can appoint them or possibly in a few cases enlarging the powers of such receivers beyond what a receiver appointed by a court of general equity powers, without the statute, might have.

(n) **Statutory Receivers, So-Called.** The English Judicature Act of 1873³⁴ extends the power of appointing receivers to certain courts and indicates generally when a receiver will be appointed. A somewhat similar judicature act is found in Ontario and other Canadian Provinces; also most states of the Union have statutes indicating very generally the courts which may appoint a receiver and the cases in which a receiver will be appointed.^{34a} Many states provide by statute for receivers in supplementary proceedings and in proceedings in aid of execution, in attachment suits, in suits under insolvent debtor acts and in stockholder's liability suits. The United States statutes have certain special provisions concerning receivers of railways.

All of these statutes of the kind just mentioned are generally codifications or statutory declarations of the ordinary powers of a court of equity to appoint a receiver in such cases. At times, however, such statutes may enlarge the powers of a court of general equity jurisdiction to appoint a receiver, or extend it to certain courts. However, these receivers are none the less equitable receivers, and even if appointed by reason of the statutes, the rights and powers and status of the receiver after he is appointed are generally fixed by the usages and rules of equity. In the final analysis, therefore, such receivers should properly be grouped under the term equitable receivers.

(o) **A Manager or Receiver and Manager** is a person appointed by the court who, by such appointment, becomes an officer of the court, not only to receive, collect, care for and dispose of the property and fruits of the property of another or others, but in addition to carry on or superintend the trade, business or undertakings of another or others.³⁵

The terms manager or "receiver and manager" are used almost exclusively in England. A receiver who performs the functions of carrying on or superintending a trade, business

³⁴ Judicature Act (1873), 36 and 37 Vic. C. 66. See Vol. II, ch. XXXII, *infra*.

^{34a} See Vol. II, ch. XXXV, *infra*.

³⁵ *In re Manchester & M. R. Co.* (1880), C. A. 14 Ch. D. 648, 653; *Truman & Co. v. Redgrave* (1881), 18 Ch. D. 547.

or undertaking, in America, is called simply a receiver, sometimes a receiver to carry on the business.

(p) **A Liquidator**, as the term is used in England, is a person appointed by a court under a special statute or statutes³⁶ to wind up a corporation under directions from the court made in accordance with the provisions of the statute or statutes therein provided. The term liquidator is used mainly in England and Canada, and other places following closely the English terminology and practice.

(q) **A Receiver after Dissolution of Corporation**, in America, is simply called a receiver; he is a person appointed by a court under special statute or statutes after dissolution of the corporation to wind up and distribute the assets of the corporation under directions from the court made in accordance with the provisions of the statute or statutes provided.³⁷

§ 13. Kinds of Receivers Appointed Out of Court. Receivers appointed out of court are practically unknown in America,³⁸ but frequently in England by agreement made between partners³⁹ and others having and representing interests in property, a receiver is appointed to receive, collect, care for and dispose of the property in accordance with such agreement. Frequently in England and less frequently in America, mortgage and debenture agreements of companies contain a provision for the appointment of a receiver to enable the holder of the charge against the property to realize and secure his security upon the happening of certain events. In the case of mortgages, the English Conveyancing and Law of Property Act of 1881⁴⁰ empowers the mortgagee to appoint a receiver without a power of appointment being specifically stated in the mortgage.

³⁶ Companies (Consolidation) Act 1908 (8 Edw. 7, 69), S. 149 (1); Companies Act 1862 (25 and 26 Vic. C. 89), S. 94.

³⁷ See for example, Ohio General Code, sec. 11943.

³⁸ See *First Nat. Bank v. Illinois Steel Co.* (1897), 72 Ill. App. 640; *First Nat. Bank v. Illinois Steel Co.* (1898), 174 Ill. 140, 51 N. E. 200.

³⁹ *Prior v. Bagster* (1888), 57 L. T. 761.

⁴⁰ 44 and 45 Vic. c. 41, S. 19-1-2-3.

Where in America we find the few instances wherein a mortgage or other instrument calls for the appointment of a receiver, such receivers are generally appointed by the court in spite of the power being in the agreement or mortgage. When the power to appoint contains a provision for the receiver to collect the rents and profits from the commencement of the suit, such a provision creates a valid lien on such rents and profits.⁴¹

§ 14. Receiver an Officer of Court. It is frequently and authoritatively said that a receiver is an officer of the court appointing said receiver.⁴² An officer is one who performs a public duty and receives compensation for it in some shape, whether from the crown or otherwise.⁴³ The duties of a receiver are 'not defined by any contract between the court and the receiver, but by law and rule prescribed by the government.'⁴⁴ And generally the receiver has to do with another man's affairs against the other man's will and without his leave, which brings a receiver within a very old definition of an officer.⁴⁵ When the court appoints a receiver and manager of a business or undertaking it assumes the management into its own hands, for the manager is the servant or officer of the court and upon any

⁴¹ First Nat. Bank v. Illinois Steel Co. (1897), 72 Ill. App. 640; First Nat. Bank v. Illinois Steel Co. (1898), 174 Ill. 140, 51 N. E. 200; other cases of receiver clause in mortgage or other instrument; Bryson v. James (1888), 55 N. Y. Supr. Ct. 374; MacKellar v. Rogers, 52 N. Y. Supr. Ct. 360; Knickerbocker Ins. Co. v. Hill (1875), 2 Hun, 680.

⁴² Porter v. Sabine, 149 U. S. 473, at 479, 37 L. ed. 815; Pennsylvania Steel Co. v. New York City Ry. Co. (1912), 198 Fed. 721, at 728; Stuart v. Boulware (1889), 133 U. S. 78, 33 L. ed. 568; Davy v. Scarth (1906), 1 Ch. 55; Platt v. Beach (1868), 2 Ben. 318; Booth v. Clark (1854), 17 How. 321, 15 L. ed. 164;

Quincy v. Railway Co. (1891), 145 U. S. 82, at 97, 36 L. ed. 632; Union Bank v. Kansas City Bank (1889), 136 U. S. 223, at 236, 34 L. ed. 341; Atlantic Trust Co. v. Chapman (1907), 208 U. S. 360, at 371, 52 L. ed. 528; Northern Brew. Co. v. Hotel (1915), 78 Ore. 453, 153 Pac. 37; Bartelt v. Smith, 145 Wis. 31, 129 N. W. 782.

⁴³ Henly v. Mayor of Lynne (1828), 5 Bing. 107; United States v. Hartwell (1867), 6 Wall. 385, 18 L. ed. 830; State, ex rel. Brennan (1892), 49 O. S. 38, 29 N. E. 593.

⁴⁴ Platt v. Beach (1868), 2 Ben. 318.

⁴⁵ King v. Burnell, Anno 11 William 3 B. R., Carthew's Rep. 478.

question arising as to the character and details of the management it is the court which must direct and decide.⁴⁶

§ 15. Receiver a Representative of the Court. Since receivers are officers of the court ⁴⁷ they are, therefore, representatives of the court ⁴⁸ and act for the court. They are subject to the court's directions and orders in the discharge of their official duties and at all times are entitled to apply to the court for instructions.⁴⁹

§ 16. When Receiver Is Agent of the United States or of the State. The Supreme Court of the United States,⁵⁰ in interpreting the fifth section of the National Bank Act,⁵¹ holds that a receiver of the national bank appointed by the controller of the United States is the agent of the United States. To the same effect is a case in the Supreme Court of Kansas.⁵²

We have also several Tennessee cases ⁵³ in which a receiver is appointed over a railroad by the governor of the state under statutes therein providing. Such receiver is called an agent of the state. It must be noted that in neither of the lines of cases cited above does the court appoint the receiver. It must also

⁴⁶ Gardner v. London, etc. (1867), L. R. 2, Ch. App. Case, 201-211; Boehm v. Goodall (1911), 1 Ch. D. 160.

⁴⁷ Cammack v. Johnson, 2 N. J. Eq. 163; Bull v. International Power Co. (1916), 98 Atl. 382, 86 N. J. Eq. 275; Stuart v. Boulware (1889), 133 U. S. 78, 33 L. ed. 568; Davy v. Scarth (1906), 1 Ch. (Eng.) 55; Platt v. Beach (1868), 2 Ben. 318; Atlantic Trust Co. v. Chapman (1907), 208 U. S. 360, at 371, 52 L. ed. 528.

⁴⁸ Harvey v. Gartner (1915), 136 La. 411, 67 So. 197; Davis v. Gray (1872), 16 Wall. 203, at 217, 21 L. ed. 447.

⁴⁹ Corey v. Long (1872), 12 Abb. Prac. Rep. (N.S.) 427; Cammack v. Johnson, 2 N. J. Eq. 163; Bull v. International Power Co. (1916), 86 N. J. Eq. 275, 98 Atl. 382.

⁵⁰ Kennedy v. Gibson, etc. (1869), 8 Wall. 498, at 504, 19 L. ed. 476; see also Price, Receiver, v. Abbott (1883), 17 Fed. 508, and cases cited; Armstrong v. Troutman (1888), 36 Fed. 276.

⁵¹ National Bank Act of June 3, 1864, sec. 54 (13 Stat. at L. 116).

⁵² Ellis v. Little (1882), 27 Kan. 719.

⁵³ Erwin v. Davenport (1871), 9 Heisk. 44, 56 Tenn. 44; Newman v. Davenport (1877), 9 Baxt. (Tenn.) 540.

be noted that being a public agent he is not liable for his contracts made as such public agent.⁵⁴

§ 17. Receiver Not Strictly Agent of Court. The duties, obligations and privileges of a court-appointed receiver are prescribed and defined by the court,⁵⁵ the law and rules of government;⁵⁶ they are not agreed upon by contract between the court and the receiver, neither are they agreed upon between the parties to the suit and the receivers. Furthermore, a court of law or equity can not delegate its authority although it may order its officers and others to do or not to do certain acts.⁵⁷ In other words, “qui facit per alium, facit per se,” which is the essence of the doctrine of agency, can not apply to the relationship of the court and its receiver⁵⁸ or the receiver and the parties to the suit,⁵⁹ therefore, the receiver can not be in the full sense of the word an agent of the court. He is not like a general agent having implied power.⁶⁰

Cases Holding Receiver Is Agent of Court. Cases in the United States are found and of our highest courts, wherein the receiver is spoken of as the agent of the court.⁶¹ In explaining these cases it may be said generally that the word must have been used in the sense of the arm of the court or the administering hand of the court and not in the full accepted legal sense of the word agent. Perhaps the word agency is the better word to use.⁶²

⁵⁴ *Erwin v. Davenport* (1871), 9 Heisk. 44, 56 Tenn. 44; *Newman v. Davenport* (1877), 9 Baxt. (Tenn.) 540; *Parks v. Ross*, 11 How. 362, 13 L. ed. 730.

⁵⁵ *Platt v. Beach* (1868), 2 Ben. (U. S.) 318.

⁵⁶ *T. L. Smith Co. v. Orr* (1915), 224 Fed. 71, at 73; *Chicago Deposit Vault Co. v. McNulta* (1893), 153 U. S. 554, at 561, 38 L. ed. 819.

⁵⁷ See sec. 532, *infra*.

⁵⁸ *Burt, Boulton & Hayward v. Bull* (1895), 1 Q. B. 276.

⁵⁹ *In re Flowers* (1887), 1 Q. B. 14, at 16; *McNulta v. Lochridge* (1891), 141 U. S. 331, 35 L. ed. 796.

⁶⁰ *Chicago Deposit Vault Co. v. McNulta* (1893), 153 U. S. 554, at 561, 38 L. ed. 819.

⁶¹ *Atlantic Trust Co. v. Chapman* (1907), 208 U. S. 376, 52 L. ed. 528.

⁶² *John H. McGowan v. Ingalls* (1910), 60 Fla. 116, 53 So. Rep. 932.

§ 18. **Receiver Not Agent of the Parties to the Suit.** The receiver, except in cases of agreement between the parties with an out-of-court receiver, is appointed by the court. Therefore, it is not possible for him to be the agent of either parties to the suit,⁶³ i. e., a receiver is not a corporation sole⁶⁴ and yet his position is somewhat analogous to that of a corporation sole with respect to which it is held by the authorities that actions will lie by and against the actual incumbents of such corporations accruing under their predecessors in office.⁶⁵

Receivers are not the servants or agents of the corporation,⁶⁶ or parties defendant, or other parties to the litigation.⁶⁷

A court-appointed receiver, far from being appointed by contract and agreement of both parties, is generally appointed against the objection of one party. The court itself when it appoints a manager or a receiver and manager of a business undertaking in effect, assumes the management into its own hands, for the manager is the servant or officer of the court and any question arising as to the character and details of the management is for the court to direct and decide.⁶⁸

In the case of a receiver being appointed in a debenture holder's action, he is not the agent of the company, the company does not appoint him, he is not bound to obey their directions and they can not dismiss him, however much they may disap-

⁶³ *Latimer v. Lord*, 4 E. D. Smith 183; also *Davis v. Duke of Marlborough*, 2 Swans. 135; contra, *Bartlett v. Cicero Light Co.* (1898), 177 Ill. 68, at 74, 52 N. E. 339; *Litchfield Mining Co. v. Beanblossom* (1907), 138 Ill. App. 122, at 127.

⁶⁴ *In re Flowers* (1887), 1 Q. B. 14, at 16; *Archambeau v. Platt Holmes, J.* (1899), 173 Mass. 249, 53 N. E. 816.

⁶⁵ *McNulta v. Lochridge* (1891), 141 U. S. 331, 35 L. ed. 796.

⁶⁶ *Pennsylvania Steel Co. v. New York, etc., Ry. Co.* (1912), 198 Fed. 774, at 777; *Wall v. Platt* (1897), 160 Mass. 401, 48 N. E. 270; Penn-

sylvania Steel Co. v. New York City, etc. (1912), 193 Fed. 286, 287; *Rochester Tumbler Works v. M. Woodbury Co.* (1913), 215 Mass. 194, at 198, 102 N. E. 438; contra, *Bartlett v. Cicero Light Co.* (1898), 177 Ill. 68, at 74, 52 N. E. 339; *Litchfield Mining & Power Co. v. Beanblossom* (1907), 138 Ill. App. 122, at 127.

⁶⁷ *City Savings Bank v. Carlon* (1910), 91 Neb. 790, 127 N. W. 161; *Lattimer v. Lord*, 4 E. D. Smith 183; *Davis v. Duke of Marlborough*, 2 Swans. 125.

⁶⁸ *Boehm v. Goodall* (1911), 1 Ch. 160; *Gardner v. London, etc.* (1867), L. R. 2 Ch. 201-211.

prove of the mode in which he is carrying on the business. Only the court can dismiss him, or give him directions as to the mode of carrying on the business, or interfere with him, if he is not carrying on the business properly.⁶⁹ Such a receiver is not a trustee for the parties. He may, as far as they are concerned, incur expenses or liabilities without their having a say in the matter.⁷⁰

Cases Holding Receiver Agent of the Corporation Defendant. We have an Illinois case holding as follows: "When the receivers were appointed by the federal court, there was no change in the corporate body. Its existence was intact, with its legal functions unimpaired, but simply its acts were performed by agents appointed by the court, and not by the corporation. The agents appointed by the court to perform its duties and exercise its functions are legally its agents, although they are under the direction of the court appointing them within the limits of its charter. The court only authorizes the receiver to exercise the privileges and perform the duties prescribed by the charter."⁷¹

In addition to these American cases holding that a receiver is an agent of the corporation, we have several English cases,⁷² which hold that a receiver appointed by a mortgagee is a mere agent of the company. In the leading English case of *Owen v. Cronk*, cited in note 72 below, the deed of trust provided that the receiver though appointed by the mortgagee shall be deemed to be the agent of the mortgagors. The receivers not being appointed by the court would not have to account to the court but to the persons who appointed him.

⁶⁹ *Burt, Boulton, etc., v. Bull* (1895), 1 Q. B. 276, 279, 280, 281; *Boehm v. Goodall* (1911), 1 Ch. D. 160.

⁷⁰ *Boehm v. Goodall* (1911), 1 Ch. D. 161.

⁷¹ *Safford v. People* (1877), 85 Ill. 561.

⁷² *Owen v. Cronk* (1895), 1 Q. B. 265; see *Gosling v. Gaskill* (1897), A. C. 577; *In re Vimbos* (1900), 1 Ch. 470; *Robinson Printing Co. v. Chicago Ltd.* (1905), 2 Ch. D. 123; *Deyes v. Wood* (1911), 1 K. B. 806.

§ 19. Receiver More a Principal than Agent. (a) English Doctrine: Receiver Being Principal to Contract. The court in exercising its jurisdiction to appoint a manager of a business (that is a receiver to run the business, as the term is used in America), acts not on the theory that the receiver is to be "in the position of agent, although there is no principal, but that he is to be in a position similar to that of persons who in a fiduciary capacity carry on a business, in the course of which contracts have to be entered into, e. g., executors or trustees, who by the terms of the instrument appointing them are directed to carry on a business for the benefit of others. The rule has always been that such persons are *prima facie* themselves personally liable and they can not get rid of liability on the contracts made by them, merely by describing themselves in the contract as executors or trustees."⁷³

When a receiver and manager is appointed by the court it has been held that he accepts the appointment in the terms that he will be personally responsible to the creditors of the business whilst he will be indemnified out of the estate. Although such a receiver is appointed for the benefit of certain holders of claims against the company, the receiver is not the agent to contract either of the court or of anybody else, but is principal.⁷⁴

Receivers running a business are in a position analogous to the position of a trustee under a will running the business of the testator.⁷⁵

When a receiver and a manager is appointed to carry on an undertaking, an obligation is placed on him of making contracts which may be necessary for so carrying on the business, and annexed to that obligation is a correlative right to be indemnified out of the assets of the company in respect of the liabilities which he might thereby incur.⁷⁶

⁷³ *Burt, Boulton & Hayward v. Bull* (1895), 1 Q. B. 276, at 284.

⁷⁴ *In re Gladsir Copper Mines* (1906), 1 Ch. D. 365, at 378.

⁷⁵ *In re British Power, Traction and Lighting Co., Ltd.* (1910), 2 Ch. D. 476.

⁷⁶ *Moss Steamship Co., Ltd.* (1912), A. C. 272.

(b) American Doctrine:—Receiver's Liability Official in Contract and Tort. The authoritative American cases do not flatly hold that a receiver in making contracts acts as principal, neither do they hold that he acts as agent of the court.⁷⁷ The American cases do not seem to flatly say whether a receiver is a principal or not. The prevailing American doctrine seems to be that the receiver's contracts, when they are made within the scope of his orders from court, are official and not personal. In this respect receivers are like public officers, who are not individually responsible upon their official contracts, nor for torts committed by their subordinates, but only for torts committed by themselves, or contracts in which they assume to bind themselves personally.

"Actions against the receiver are in law actions against the receivership, and his contracts, misfeasances, negligences and liabilities are official, not personal."⁷⁸

It is the settled law in the state of New York⁷⁹ and other states⁸⁰ that a receiver, who enters into a contract as such by the direction of authority of a court having jurisdiction to confer such authority or make such direction, is not personally liable on the contracts so entered into.

Mr. Justice Brown of the United States Supreme Court says: "It actions were brought against the receivership generally or against the corporation by name, 'in the hands of' or 'in possession of' a receiver, without stating the name of the individual, it would more accurately represent the character or status of the defendant,"⁸¹ the receiver.

⁷⁷ *Farmers, etc., v. Central R. R.* (1880), 7 Fed. 537.

⁷⁸ *McNulta v. Lochridge* (1891), 141 U. S. 327, at 332, 35 L. ed. 796; *American B. & T. Co. v. Baltimore, etc.* (1903), 124 Fed. 879; *Texas & P. Ry. v. Cox* (1891), 145 U. S. 593, at 601, 36 L. ed. 829.

⁷⁹ *Saenger v. Smith* (1899), 45 N. Y. App. D. 364, 60 N. Y. Supp.

849; affirmed, without opinion, 167 N. Y. 600, 60 N. E. Rep. 1120; *Livingston v. Pettigrew*, 7 Lans. 405; *New York & W. U. Tel. Co. v. Jewett* (1889), 115 N. Y. 166, 21 N. E. 1036.

⁸⁰ *Thornton v. Highland Ave. Ry.*, 10 So. Rep. 442, 94 Ala. 353; *McGowan v. Ingalls*, 53 So. Rep. 932, 60 Fla. 116.

⁸¹ *McNulta v. Lochridge* (1891), 141 U. S. 327, at 331 and 332, 35 L. ed. 796.

§ 20. Receiver Not Successor of Original Owner. When a receiver is appointed to carry on a business or operate a railroad or other public utility, he either operates and incurs contractual and tort liabilities primarily in his own name and is entitled to indemnity out of the funds in his hands,⁸² or else he operates the property in his official capacity and is liable "as receiver."⁸³ In either case he does not operate the properties or carry on the business as mere successors of the company over whose property the court has appointed a receiver.⁸⁴

§ 21. Receiver Not a Trustee. "A receiver is not an agent for any other person, and a receiver is not a trustee."⁸⁵ "He is not strictly a trustee, as he has not the legal title, and has assumed the performance of no express or definite trusts. He only obeys the orders and directions of the court which he represents in holding the property. When there are adversary rights to be determined, an indifferent person between the claimants ought to be appointed receiver, as he is to hold the property for the benefit of such party as may establish his right."⁸⁶

"A trustee may be appointed by will, deed or in other ways, without the order of any court, and without a suit pending, and his powers, as a rule, are governed by the instrument creating the trust and not by decree of court. Property in his possession as trustees is not in custodia legis, as in the case of receivers or other officers of the law or of the courts, and he may be called to account by any court of equity obtaining jurisdiction."⁸⁷

The powers of a receiver are not fixed by law alone, but by the order of appointment. His duties vary in each case. In some instances, they are active; he must operate a railroad, sell a stock of goods, manage a farm, or collect rents. He is often

⁸² English Doctrine, see sec. 19 (a), *supra*.

⁸³ American Doctrine, see sec. 19 (b), *supra*.

⁸⁴ *Barber Asphalt Co. v. Street Ry.* (1909), 175 Fed. 154; *Butterworth v. Degnon Const. Co.* (1914), 214 Fed. 772.

⁸⁵ *Corporation of Bacup v. Smith* (1890), 44 Ch. D. 395, at 398.

⁸⁶ *Naumburg v. Hyatt* (1885), 24 Fed. 398, at 901.

⁸⁷ *Nevitt v. Woodburn* (1901), 190 Ill. 283, at 289, 60 N. E. 500.

a mere stakeholder to preserve the property until final decree; he has no fixed duty or inherent power. Unless authorized to do so, he has no right to bring suit. But the duties of a trustee in bankruptcy are fixed by statute.⁸⁸

The relation between the receiver and the owner of the property is more like that of caretaker and owner.⁸⁹ Although a receiver is not a trustee, nevertheless the degree of care exacted of him in the handling of the property entrusted to the receiver is measured by that degree of care exacted of persons acting as trustees, executors and assignees.⁹⁰

A receiver has been called, in England, a quasi trustee,⁹¹ and his liabilities in tort, in England, it would seem, are based on the doctrine of the liability in torts of executors and trustees; the liability of a receiver in tort in America seems to be worked out along different lines.⁹²

§ 22. Receiver More like Administrator than Assignee. Said Sanborn, J.:⁹³ "The position of a receiver in a suit brought by a creditor against an insolvent debtor for the appointment of a receiver in a suit brought by a creditor against an insolvent debtor for the appointment of a receiver, the administration and sale of his property and the distribution of its proceeds among his creditors is more nearly analogous to that of an administrator of the estate of a deceased person than that of an assignee for the benefit of creditors. He is appointed, his powers are conferred, and his duties are imposed by the court and the law, and not by the voluntary conveyance of the debtor. His primary duty is to hold, administer, convert into money, and distribute the proceeds of the property for the benefit of

⁸⁸ *Traders Ins. Co. v. Mann* (1903), 118 Ga. 381, at 383, 45 S. E. 426.

⁸⁹ *Patterson v. Gas Light & C.* (1896), 2 Ch. D. C. A. 476, at 483.

⁹⁰ *Massey v. Banner*, Lord Eldon (1820), 1 J. & W. 247.

⁹¹ *Bevan on Negligence*, 3d ed., Vol. II, p. 1266.

⁹² *Bevan on Negligence*, 3d ed., Vol. II, p. 1267; *McNulta v. Lochridge* (1891), 137 Ill. 270, 27 N. E. 452; *McNulta v. Lochridge* (1891), 141 U. S. 327, at 332, 35 L. ed. 796.

⁹³ Circuit Court of Appeals, Eighth District (1915), in *T. L. Smith Co. v. Orr*, 224 Fed. 71, at 73.

creditors, for they have the larger, and generally the entire pecuniary interest in it. He is appointed on the petition of a creditor for the benefit of the creditors, and is in fact, their representative far more than he is the representative of the debtor.”⁹⁴ An assignee for the benefit of creditors holds the title to the property and derives it directly from the assignor and not from the court. His possession is not always the possession of the court, and the property he holds is not necessarily in custodia legis. He is not an officer of the court and does not derive his powers from the court, but from the deed of his assignor and the statute law of the state. Such is his status except where the statute law of a particular state has changed it.⁹⁵

§ 23. Persons Entitled to Appointment of Receiver. A court of equity of the United States has no jurisdiction at the instance of a simple contract creditor, to appoint a receiver for property upon which assets he asserts no specific lien.⁹⁶ The federal courts enforce equitable rights under chancery practice. A creditor's bill must be preceded by a judgment at law establishing the measure and validity of the demand of the complainant for which he seeks satisfaction in chancery.⁹⁷ The simple contract creditors of a corporation have no more lien on the assets of a corporation than they have on the assets of an individual, and, therefore, have no standing in a federal court of equity to obtain the seizure of the debtor's property and its application to the judgment of their debts.⁹⁸

Any state statute which authorizes the appointment of a receiver at the instance of a creditor or creditors without lien

⁹⁴ *T. L. Smith Co. v. Orr* (1915), 224 Fed. 71, at 73.

⁹⁵ *Durand & Co. v. Howard & Co.* (1914), 216 Fed. 585, at 590; see *Adler v. Ecker* (1880), 2 Fed. 126; *Lehman v. Rosengarten* (1885), 23 Fed. 642; *Lapp v. Van Norman* (1884), 19 Fed. 406; *Collins v. Williamson* (1915), 229 Fed. 59.

⁹⁶ *Maxwell v. McDaniels* (1910), 184 Fed. 311; *Davis v. Hayden* (1917), 238 Fed. 734, at 738.

⁹⁷ *Smith v. Railroad Co.* (1878), 99 U. S. 398, at 401; 25 L. ed. 437; *Wiggins v. Armstrong*, 3 Johns. Ch. 144; *Herricks v. Robinson*, 3 Johns. Ch. 296; *Greenway v. Thomas*, 14 Ill. 271; *Gorten v. Massey*, 12 Minn. 145, at 147; *Skeele v. Stanwood*, 33 Me. 309.

⁹⁸ *Hollins v. Brierfield C. & Iron Co.* (1893), 150 U. S. 371, 37 L. ed. 1113; *Davis v. Hayden* (1917), 238 Fed. 734, at 738.

or judgment is against the usages and rules of equity. Such a statute in Georgia has been strictly construed.⁹⁹

The party seeking a receiver must have some right or interest in the property or at least have some colorable claim to a right or interest in the property.¹

The practice which obtains in the federal courts obtains generally in the state courts, even in the code states which permit a litigant to proceed in one suit to such both legal and equitable relief. Even in such states the principles governing and the grounds for such extraordinary relief remain unaltered.²

§ 24. For Whose Benefit Receiver Is Appointed. When a receiver is appointed in a suit he is appointed by the benefit of such of the parties in that suit as it shall afterward appear were entitled to the funds or property in controversy, but not for the benefit of strangers to the suit. If the receivership interferes with the right of a stranger, he may apply to the court to be heard *pro interesse suo* and his rights will be protected against any inequitable interference therewith by the officer of the court. But the appointment of a receiver does not give a mere stranger to the suit the benefit of the proceedings without cause so as to authorize him to claim that which he would not have been entitled to if such receiver had never been appointed.³

§ 25. No Appointment of Receiver as against a Complainant. The chancellor of New Jersey said: "But I find no case in which a receiver has been appointed as against a complainant upon the application of a defendant. The matter of practice and precedents was inquired into and settled by

⁹⁹ *Farmers Union Ware, etc., v. Coweta F. Co.* (1909), 133 Ga. 132, 65 S. E. 291.

¹ *Red River Potato, etc., v. J. W. Bernardy* (1914), 126 Minn. 440, 148 N. W. 449.

² *Virginia-Carolina C. C. v. Provident, etc.* (1906), 126 Ga. 50, 54 S. E. 929.

³ Junior mortgagee getting a receiver has an advantage, *Howell v. Ripley*, 10 Paige 43, cited in *Coddington v. Bispham*, 36 N. J. Eq. 577, when junior mortgagee by his diligence does get a certain advantage.

Lord Langdale in *Robinson v. Hadley*, 11 Beav. 614. I find no precedent anywhere to sustain such practice. The whole theory upon which relief is granted in equity is against such practice. No positive relief is ever granted to a defendant except on cross-bill and no relief except it be founded on allegations in the bill or other pleadings in the cause.”⁴

§ 26. Appointment of Receiver on Application of One Co-defendant against Others. The cases in which the court has refused a receiver against a codefendant are cases where the party was not seeking the aid of the court, and no decree could be made for him. But where the complainants seek to be substituted to the rights of the first mortgagee and to make him enforce all his rights against the mortgagor, in that case both mortgagees are seeking relief against the mortgagee and his tenant. In such a case the court may decree in favor of one defendant against another. In fact, it is required to do so, in order to afford the relief to which the complainants are entitled. And if as between the defendants, the court may decree relief, it follows that it may make any interlocutory order that may be made necessary to obtain relief.⁵

§ 27. What Parties or Claimants Receiver Stands for.
(a) Receiver Not Always an Indifferent Party. It is frequently said that a receiver is an indifferent party.⁶ A chancery, equitable or pendente lite receiver appointed by the court to simply preserve the property should be indifferent as between the parties, yet the same rule does not apply with the same rigor to receivers appointed by judgment creditors or mortgagee creditors to realize the property for such judgment creditors. For instance after a decree of dissolution of a partnership the

⁴ *Leddell's Exr. v. Starr*, 19 N. J. Eq. 159.

⁵ *Henshaw v. Wells*, 9 Humph. (Tenn.) 566, at 584.

⁶ *Pennsylvania Steel Co. v. New York City Ry.* (1912), 198 Fed. 721, at 728.

receiver who is appointed "is the embodiment of creditors. He stands as and for them."⁷

(b) When Receiver Stands for All Parties. A *pendente lite* receiver appointed to preserve the property of the defendant and manage the property for the benefit of all concerned in fact and in law represents the court which appoints him, yet it is frequently said that he represents all interests concerned.⁸ What is really meant by this is that, "He is not to advocate the cause of one claimant against another. Between them he is indifferent, owing a like duty to all; and for that reason should as far as possible see to it that each has an equal opportunity to enforce his claim. He stands as their representative and is bound to give them reasonable aid."⁹ A receiver is not the representative of the party defendant alone.¹⁰

It is held in Louisiana that "there is a limit to the extent that the receiver can represent the creditors in opposing a contract entered into by the debtor, and that such opposition is limited to questions of fraud."¹¹

(c) Receiver of Partnership after Dissolution Stands for Creditors. It is frequently said that a receiver is indifferent between the parties, that he stands for all of them.

However, the New Jersey courts have frequently said that the receiver of an insolvent corporation is the representative of its creditors, and as such may, by suit or defense, avoid any

⁷ *Brockhurst v. Cox* (1906), 71 N. J. Eq. 703, at 709, 64 Atl. 182; *Wimpfheimer v. Perrine* (1904), 67 N. J. Eq. 597, at 600, 50 Atl. 356.

⁸ *Weeks v. Weeks*, 106 N. Y. 626, 13 N. E. 96; *Bull v. International Power Co.* (1916), 86 N. J. Eq. 275; 98 Atl. 382; *Harvey v. Gartner* (1915), 136 La. 411, at 434, 67 So. 197; *City Savings Bank v. Carlon* (1910), 127 N. W. 161, 87 Neb. 266; *Davis v. Gray* (1872), 16 Wall. 203, at 217, 21 L. ed. 447; see *Davis v. Duke of Marlborough*, 2 Swans. 125; *Shakel v. Duke of Marlborough* (1819), 4 Madd. 463.

⁹ *People, ex rel. Attorney General, v. Security Life Ins. Co.*, 79 N. Y. 267, at 270; see *Bull v. International Power Co.* (1916), 86 N. J. Eq. 275, 98 Atl. 383.

¹⁰ *Rochester Tumbler Works v. M. Woodbury Co.* (1913), 215 Mass. 194, 198, 102 N. E. 438; *Atlantic Trust Co. v. Chapman* (1907), 208 U. S. 360, at 371, 52 L. ed. 528; *Stannard v. Robert H. Reid Co.* (1907), 118 N. Y. App. Div. 304, 103 N. Y. S. 521, at 527.

¹¹ *In re Pleasant Hill Lumber Co.* (1910), 126 La. 743, at 757, 52 So. 1010.

instrument which is void as against them.¹² And a receiver of a partnership who is appointed after a decree of dissolution for the purpose of winding up its affairs and distributing the money to its creditors so far represents its creditors as to be invested with powers in their behalf to attack the validity or to resist the enforcement of a chattel mortgage given by the partners.¹³ The receiver in such a final decree of dissolution becomes the representative of the creditors.¹⁴

(d) Receiver of Insolvent Corporation Stands for Creditors and Stockholders. A receiver of an insolvent corporation is allowed to question the fraudulent and illegal acts of the corporation he represents, both for the creditors and stockholders.¹⁵ The receiver is bound by the legal acts of the corporation; it is only those which are illegal which he can impeach.¹⁶

The reason generally given by the courts why he represents the creditors is that the statute or statutes¹⁷ "fasten the debts of a corporation on its property the moment it is adjudged to be insolvent and a receiver is appointed to wind up its affairs. From that time forth its property is, by law, appropriated exclusively and irrevocably to the payment of its debts. Power is conferred on its receiver to take possession of all of its property and to convert it into money, to the end that the money thus obtained may be distributed among its creditors."¹⁸

A temporary receiver appointed in voluntary proceedings for dissolution of a corporation instituted under the New York statute with plenary powers to carry on the business, and also with all of the powers of a permanent receiver so far as the

¹² *Graham Button Co. v. Spielmann*, 50 N. J. Eq. 120, 24 Atl. 571.

¹³ *Brockhurst v. Cox* (1906), 71 N. J. Eq. 703, at 710, 64 Atl. 182.

¹⁴ *Brockhurst v. Cox* (1906), 71 N. J. Eq. 703, at 710, 64 Atl. 182.

¹⁵ *Farmers Loan & T. Co. v. Baker* (1897), 20 N. Y. Misc. Rep. 387, 46 N. Y. S. 266; *Porter v. Williams* (1853), 9 N. Y. 142, at 149; *Gillet v. Moody*, 3 N. Y. 479; *Leavitt v. Palmer*, 3 N. Y. 19; *Bronwer v. Hill*,

1 Sandf. 629; *Hyde v. Lynde*, 4 N. Y. 392.

¹⁶ *Porter v. Williams* (1853), 9 N. Y. 142, at 149.

¹⁷ *New Jersey Rev. St.*, p. 189, sec. 72; *New Jersey Rev. St.*, p. 191, sec. 80.

¹⁸ *Graham Button Co. v. Spielmann* (1892), 50 N. J. Eq. 120, at 124, 24 Atl. 571; see also *Wimpfheimer v. Perrine* (1904), 67 N. J. Eq. 597, 50 Atl. 356.

statute permitted, was allowed to bring proceedings to set aside a mortgage given by the corporation.¹⁹

The United States Circuit Court, Southern Division, New York, in 1910, Hand, Judge, delivering the opinion, has gone so far as to say: "If a statutory receiver may dispute the mortgage, may a sequestration receiver in equity do the same? Such a receiver may be appointed only after judgment except by the consent of the defendant, and his duties are similar in character to those of a receiver after judgment of a corporation or individual, except as these have been hedged about with statutory limitations. The rationale of the cases seems to be the same. Each is the representative of the creditors."²⁰

(e) When Receiver under Statute Stands for the Corporation. Under the Ohio statutes providing for the winding up of a corporation²¹ which vests the receiver, upon his qualification as such, with all the estate, real and personal, of the corporation,²² he becomes a trustee for the estate for the benefit of creditors and stockholders and is clothed with the power conferred by law upon trustees to whom assignments are made for the benefit of creditors.²³ Such a receiver stands in a suit against stockholders as the representative of the corporation, taking the rights of the corporation, such as could have been asserted in its name, and on that basis only can he litigate.²⁴

Said Comstock, J., discussing the rights of a receiver of an insolvent corporation²⁵ appointed under a New York statute:²⁶ "In general, then, a receiver of this description takes merely the rights of the corporation, such as could be asserted in his own name, and on that basis only can he litigate for the benefit of either stockholder or creditors, except when acts have been

¹⁹ *Farmers L. & T. Co. v. Baker* (1897), 20 N. Y. Misc. Rep. 387, 46 N. Y. S. 266.

²⁰ *Bell v. New York Safety S. P. Co.* (1910), 183 Fed. 274, at 276; see *Gray v. Davis* (1871), 1 Woods Rep. 420.

²¹ Ohio R. S., secs. 5651-5688, inclusive; Ohio General Code, sec. 11938, et seq.

²² Ohio R. S., sec. 5651; General Code, sec. 11938, et seq.

²³ *Smith, Receiver, v. Johnson* (1898), 57 O. S. 486, at 487, 49 N. E. 693.

²⁴ *Smith, Receiver, v. Johnson* (1898), 57 O. S. 486, at 488, 49 N. E. 693.

²⁵ *Curtis v. Leavitt* (1857), 15 N. Y. 9, at 43.

²⁶ New York R. S., secs. 463, 464, as of 1857.

done in fraud of the rights of the latter but valid as to the corporation itself.

"It is true, indeed, that he is declared to be a trustee for creditors and stockholders, but this only proves that they are the beneficiaries of the fund in his hands without indicating the sources of his title or the extent of his powers. If, then, in a controversy between the receiver and third parties, in respect to the corporate estate, it is possible to form a conception of rights, legal and equitable, belonging to the shareholders as individuals which the corporation itself could not assert in its own name, the receiver does not represent those rights. So far as a shareholder is concerned, he can litigate respecting the fund upon precisely the grounds which would be available to the corporation if it were still in existence, solvent, and no receivership had been constituted."²⁷

(f) When Receiver in Foreclosure Proceedings Stands for Mortgagee. It is frequently stated that a receiver is an indifferent person. This may be partially true when the receiver is appointed merely to preserve the property, but when a receiver is appointed to realize the property, as is frequently the case in foreclosure proceedings, then he is not an indifferent party. To be sure he is still the representative of the court and under the court orders, but he is primarily realizing the property for the mortgagee at whose instance he has been appointed.

For a full discussion of this subject, see sec. 156, et seq., ch. IX, supra, "Mortgagor Obtaining Receiver Has Prior Right to Rents and Profits," et seq.

(g) Receiver in Supplementary Proceeding Stands for Creditors. Without statute creditors' bills in equity are maintainable to reach equitable assets of judgment debtors or to set aside obstructions which are in the way of the judgment creditor when he seeks to apply the assets of the judgment debtor

²⁷ Curtis v. Leavitt (1857), 14 N. Y. 9, at 44; see subject discussed by Indiana courts, Marion Trust Co. v. Blish (1908), 170 Ind. 686, 84 N. E. 814, 85 N. E. 344, and cases cited.

to his judgment. Some states by statute effect the same thing by proceedings in aid of execution, other states effect the same thing by statute under supplementary proceedings with or without a receiver.²⁸

Such a receiver represents the judgment debtor and creditors²⁹ and can bring any action relating to property rights that he might bring, because under the statute the receiver has title.³⁰ The receiver also represents the judgment creditor in equity to the extent necessary to bring actions in the nature of a creditor's bill to set aside fraudulent transfers for "he comes in by the act of the law and not by the act of the party."³¹

"The receiver is trustee for the judgment creditor to receive and to remove obstacles by equitable procedure so that he may receive the property of the debtor, whether in his own hands or in the hands of others, as of the date of service of the order in supplementary proceedings, but not so as to affect the title of a purchaser in good faith or the payment of a debt in good faith."³² Such a receiver can not, however, uphold an action at law for the conversion of property transferred, even in fraud of creditors, before he was appointed, because that is not "the property of the judgment debtor" within the meaning of Section 2468 of the Code of Civil Procedure,³³ which is the source of his power.³⁴

(h) Receiver in Proceedings in Aid Stands for Creditors.
(i) Receiver under Creditor's Bill Stands for Creditors. A receiver, as indicated in (h) and (i), stands for the same

²⁸ New York Code of Civil Procedure, sec. 2464.

²⁹ *Porter v. Williams* (1853), 9 N. Y. 142, at 149.

³⁰ New York Code of Civil Procedure, sec. 2468; *Ward v. Petrie* (1898), 157 N. Y. 301, at 307, 51 N. E. 1002.

³¹ *Ward v. Petrie* (1898), 157 N. Y. 301, at 307, 51 N. E. 1002, citing *Porter v. Williams*, 9 N. Y. 142, 149; *Underwood v. Sutcliffe*, 77 N. Y. 58, 62; *Mandeville v. Avery*, 124 N. Y. 376, 385, 26 N. E. 951.

³² *Ward v. Petrie* (1898), 157 N. Y. 301, at 307, 51 N. E. 1002,

citing New York Code of Civil Procedure, sec. 2469; *McCorkle v. Herrman*, 117 N. Y. 297, 302, 22 N. E. 948.

³³ Referring to the New York Code of Civil Procedure.

³⁴ *Stephens v. Meredin Britannia Co.* (1899), 160 N. Y. 178, at 183, 54 N. E. 781, citing *Ward v. Petrie*, 157 N. Y. 301, 51 N. E. 1002; *Pettibone v. Drakeford*, 37 Hun, 628; see also *Stephens v. Perrine* (1894), 143 N. Y. 476, at 483, 39 N. E. 11; *Belk v. New York S. S. P. Co.* (1910), 183 Fed. 274.

persons and parties as does a receiver in supplementary proceedings. Therefore see (g), *supra*.

(j) Receiver's Right to be Heard as to Attachments. Under the law of New York, as it stood in 1868, it was held on the ground that a motion in a suit can only be made by a party to the same, therefore, a receiver has no status unless he is made a party to dispute and attachment issued previous to the receiver's appointment.³⁵ However, New York Civil Code, Section 826, extends the right to move to discharge an attachment to any person, who, after the attachment issued, acquired an interest in or lien upon the property attached. Under this section the receiver may move by virtue of that relation and need not be a party to the suit.³⁶

Under a Mississippi statute³⁷ it is held that a right to intervene in an attachment suit which is allowed to creditors of the defendant in attachment includes a receiver, because by the circumstances of his appointment he is made the representative of the creditors interested in a fund in his hands.³⁸

§ 28. Appointment of Receiver an Equitable Remedy. In ordinary common-law actions a general and unqualified judgment only can be given.³⁹ The common law has an old-fashioned dislike for extreme measures.⁴⁰ Accordingly, a court in a common-law action, without the assistance of statute⁴¹ or equity jurisdiction, can do little more than give judgment for plaintiff or defendant.⁴²

By no known procedure of the common law, unaided by statute,⁴³ can a man be ordered, at least before a full trial on

³⁵ *Tracy v. Bank of Selma* (1868), 37 N. Y. 523.

³⁶ *National S. & L. Bank of N. Y. v. M. N. Bk. of Newark* (1882), 89 N. Y. 440, at 442.

³⁷ *Acts of Mississippi* (1884), p. 26, ch. 44, secs. 2 and 3.

³⁸ *Paine v. Holliday* (1890), 68 Miss. 298, 8 So. 676.

³⁹ *Story, Equity Jurisprudence*, Vol. 1, par. 26.

⁴⁰ *History of English Law*, Pol. & Mait., Vol. 2, p. 594.

⁴¹ *Wilson v. Martin-Wilson, etc.* (1890), 151 Mass. 515, at 521, 24 N. E. 784.

⁴² *Langdell, Summary of Equity Pleading*.

⁴³ *Gerry v. Gerry*, 63 N. Y. 252, at 256; *Wilson v. Martin-Wilson, etc.* (1890), 151 Mass. 515, at 521, 24 N. E. 784.

the merits of the case, to give up his property to the custody of the court. A case may frequently be presented to the court wherein one party has the possession and even legal ownership of property, and the party holding the same is not the proper party to do so, pending the court's final adjudication as to some controversy concerning the property. Thereupon the court appoints a receiver of the property, by reason of its equitable powers or special powers given by statute, and not by reason of its common-law jurisdiction. The courts of equity, through the medium of their power over the person, mediately affect the rights of property, both real and personal.⁴⁴

Furthermore, a party may have a judgment but can not have execution issued against the property of the judgment debtor in the ordinary way because there are obstacles in the way of legal execution. In that case he files a creditor's bill and has a receiver appointed.⁴⁵ In England such a procedure is called "the appointment of a receiver by way of equitable execution."⁴⁶

The appointment of a receiver is equitable relief and can only be granted when the proper parties are before the court.⁴⁷ Equity acts in personam, therefore, there must be a party against whom the proceeding may be instituted.⁴⁸

Appointment of Receiver Not an Equitable Right. A distinction must be made between a right and a remedy. Rights between man and man are either agreed upon between the parties or are laid down by the sovereign power, either in the form of a constitution and legislation or by the rulings of judges on the bench. Parties may agree between themselves that a receiver may be appointed over their property. This is sometimes done in England, but rarely in America. In such a case a right to have a receiver exists between man and man. However, in this work we are

⁴⁴ *Russel v. Myers Excursion & Transfer Co.* (1907), 67 Atl. 1016, 73 N. J. Eq. 192.

⁴⁵ *Geery v. Geery* (1875), 63 N. Y. 256.

⁴⁶ *Harris v. Beauchamp Bros.* (1894), 1 Q. B. 801.

⁴⁷ *In re Shephard*, 43 Ch. 31; *Russel v. Myers Excursion & Transfer Co.* (1907), 67 Atl. 1016, 73 N. J. Eq. 192.

⁴⁸ *In re Cave W. N.* (1892), p. 142; *quere*, *Waddell v. Waddell & Cave W. N.* (1892), p. 227, 67 L. T. 289.

dealing, except where otherwise expressly stated, with a court-appointed receiver. If one has the right to receive another's property, by reason of contract or otherwise, and the matter is disputed, the court at the termination of the proper trial will declare the title absolutely where it belongs, which is a declaration of a primary right. But a receiver appointed by the court does not get absolute title to the property for himself or anyone else. The court itself takes the property from the owners, or him in possession, and the receiver is simply the necessary arm of the court to take the property. The court itself has no absolute right to the property, neither has the receiver. But the court, by a power granted to it by the sovereign for the advancement of justice⁴⁹ has a right and takes custody of the property through its receiver for the purpose of accomplishing what the courts are organized for, namely, to determine controversies and through their proper officers and the agencies of the sovereign carry out their decrees. Thus the purpose of the court in taking the property is simply provisional and to enable the court to give to a litigant what belongs to him. The appointment of a receiver is the means and not the end. Since no litigant can force a judge to do a judicial act, except in perhaps rare occasions (the writ of habeas corpus is said to be a writ of right⁵⁰), no litigant has a right to have the court take another's property into its custody by the appointment of a receiver. Before a court will appoint a receiver the litigant must bring a proper suit before the court and claim a primary right has been violated, and the court at its discretion appoints a receiver. The appointment of a receiver in itself determines no right.⁵¹

§ 29. Appointment of Receiver Not a Proceeding in Rem.

It is sometimes said that the appointment of a receiver is a proceeding in rem, and more frequently that it is a proceeding

⁴⁹ Hopkins v. Worcester Canal, L. R. 6 Eq. 447; Cupit v. Jackson, 13 Pri. 734.

⁵⁰ Ex parte Davis, 7 Fed. Cases No. 3613.

⁵¹ Baltimore Bldg. & L. Assn. v. Alderson (1900), 99 Fed. 489, at 494; Hull v. Caughy (1886), 66 Md. 104, 6 Atl. 591.

in the nature of a proceeding in rem. This latter statement may be correct, but the former is not, strictly speaking, true. Equity acts in personam and when a court of equity appoints a receiver it enjoins or orders the defendant or other party to the suit to give up property and orders the receiver to take possession for the court.⁵² When the court acts upon property it does it mediately and not immediately.

(a) Distinction between Appointment of Receiver and Proceedings in Rem. Property may come into the hands of a receiver subject to admiralty liens, which in one way are only enforceable by federal admiralty courts. Such a lien is a property right which all courts, both federal and state, must recognize and enforce in all ways, excepting under federal admiralty practice which under the constitution and laws of the United States, ordinary courts are not allowed to administer.

Such an admiralty lien being valid, and a state or federal court being obliged to recognize it, all such court can do is to make an administrative order which affects the money or other property within the possession of the court and covered by the maritime lien. The making of such an order does not involve the exercise of any of the powers which are vested exclusively in the federal admiralty courts. The proceeding of the court appointing the receiver and making an order concerning the property in the court's possession, through its receiver, is not a proceeding strictly in rem. It is a proceeding in personam, analogous to a foreclosure suit in which the parties have appeared and have litigated their respective claims in respect to a res within the custody of the court or subject to its control. The order which the court makes is binding upon the parties litigant in the court making the order and elsewhere. It compels the receiver to pay a sum of money which is in their possession.⁵³

(b) Administration of Estate by Receiver Not Proceeding in Rem. The libel of a vessel⁵⁴ and the administration of an

⁵² *Russel v. Myers Excursion & Transfer Co.* (1907), 67 Atl. 1016, 1018, 73 N. J. Eq. 192.

⁵³ *Russel v. Myers Excursion &*

Transfer Co. (1907), 67 Atl. 1016, 73 N. J. Eq. 192.

⁵⁴ *The Glide* (1896), 167 U. S. 606, 42 L. ed. 296; *Hawkins v. The Cox & Sons Co.* (1899), 63 N. Y. L. 512.

estate of a decedent by an executor or administrator is purely a proceeding in rem. Pure proceedings in rem are not against the whole world.⁵⁵ Not so the administration of an estate by a receiver. Such an administration may be at times in the nature of a proceeding in rem, but it is not strictly so. The acts of such receiver and the orders of the court in which the estate is administered do not bind persons who are not parties to the proceeding and who had no opportunity of being heard.⁵⁶

§ 30. Appointment of Receiver an Extraordinary Remedy.

In ordinary court proceedings, either legal or equitable, a suitor can only get redress at the end of litigation, and after the party against whom redress is finally given by the court has been given a full hearing in court and allowed all the defenses, privileges and protection which the common law or the usages of equity afford him. A receiver, however, is appointed over property and the custody of property taken by the court, generally at the beginning of litigation,⁵⁷ sometimes without service upon the party or a hearing from him, and in proper emergencies even without notice. Such a proceeding is certainly extraordinary.⁵⁸ Lest it be said that this is taking a man's property without due process of law, it must be borne in mind that the unqualified possession and title of a man's property is not thus taken from him by the appointment of a receiver, but only the custody of his property during the suit and until rights and titles can be tried out by full proceedings. At the close of the litigation, the property may be and often is returned to him.

⁵⁵ *Wilson v. Martin-Wilson, etc.* (1890), 151 Mass. 515, at 531, 24 N. E. 784.

⁵⁶ *Pollitzer v. Citizens T. Co.* (1915), 108 N. E. 36, 60 Ind. App. 45; *J. W. Daun Mfg. Co. v. Parkhurst* (1890), 125 Ind. 317, at 321, 25 N. E. 347, cases cited.

⁵⁷ *State, ex rel. Dauphin, v. Ellis, Judge*, 108 La. 531, 32 So. 335, cited in *Teutonia Bk. v. Brewing Co.* (1915), 137 La. 1046, at 1056, 69

So. 833; *United States v. Dominion Oil Co.* (1917), 241 Fed. 425, at 427.

⁵⁸ *Smith v. Brown* (1908), 50 Wash. 240, at 242, 96 Pac. 1077; *Strum v. Blair* (1913), 182 Ill. App. 413, at 415; *Prudential Sec. Co. v. Three Forks* (1914), 49 Mont. 567, 144 Pac. 158; *Robbins v. Reed* (1910), 174 Fed. 291; *Mannos v. Bishop B. B. Co.* (1914), 104 N. E. 579, 181 Ind. 343.

The appointment of a general receiver of the assets of a corporation, or a copartnership, or an individual, carrying on an active business in which the maintenance of the credit of the respondent is a necessary element, is quite equivalent to an execution before judgment, and means ordinarily financial ruin.⁵⁹

Since it is a serious interference with the rights of the citizen, without a verdict of a jury and before a regular hearing, it should only be granted for the prevention of manifest wrong and injury.⁶⁰

A less drastic measure than a receivership may be to require of the defendant a bond to hold the plaintiff harmless if the case may be decided in his favor and account to the plaintiff or to the clerk of the court for the profits from the property and that the plaintiff will suffer no harm or waste in respect to the property.⁶¹

§ 31. No Appointment of Receiver when Injunction Is Adequate Relief. A receiver will not ordinarily be appointed when the court, by the less drastic remedy of granting an injunction, can adequately protect the rights of the complainants.⁶² The appointment will never be made where there is another safe remedy, or where the court can find a less stringent means of protecting the rights of the parties.⁶³ A receiver should not be appointed at any stage of the proceedings if any other remedy will afford adequate protection to the party applying.⁶⁴

⁵⁹ *Joseph Dry Goods Co. v. Hecht* (1903), 120 Fed. 760.

⁶⁰ *Lancaster v. Asheville St. Ry. Co.*, 90 Fed. 129; *United States v. Dominion Oil Co.* (1917), 241 Fed. 425; *Crawford v. Ross* (1869), 39 Ga. 44.

⁶¹ *Parsille v. Brown* (1915), 154 N. W. 569, 188 Mich. 485; *Davis v. Leonard* (1913), 66 Fla. 351, 63 So. 834.

⁶² *Continental Trust Co. v. Brown* (1915), 179 S. W. 939 (Texas Civil Court of Appeals); *Cabiness v. Reco Min. Co.* (1902), 116 Fed. 318;

Crawford v. Wilson (1913), 139 Ga. 654, at 663, 78 S. E. 30; *Bergman Clay Mfg. Co. v. Bergman* (1913), 73 Wash. 144, 131 P. 485; *McCarthy v. Peake* (1859), 18 H. Pr. 138; *Cass v. Realty Securities Co.* (1911), 144 N. Y. App. Div. 916, 129 N. Y. S. 400; *Fischer v. Superior Court* (1895), 110 Cal. 129-138, 42 Pac. 561.

⁶³ *Blades v. Billings, etc.* (1911), 154 Mo. App. Rep. 350, 134 S. W. 579.

⁶⁴ *Wright v. Wright* (1913), 180 Ala. 343, 60 So. 931.

§ 32. Appointment of Receiver Farther Reaching than Injunction. The appointment of a receiver and the order to him to take possession of property is the exercise of a higher and more far-reaching power than the granting of an injunction and should not be resorted to where an injunction will as well serve the purpose of the judicial proceeding and to the same extent protect the rights of the complainant. When a mere preservative injunction is issued the defendant is assured that his rights in and to the property will be preserved by a full hearing on its merits. Whereas, if a receiver is appointed upon an interlocutory order made at any time, the receiver, under the direction of the court, may sell the property and it thus be forever passed from the defendant's control, notwithstanding the final result of the litigation might establish the case in favor of the defendant.⁶⁶ Thus the receivership is the harsher and more drastic and more comprehensive remedy.⁶⁷ An order for injunction is always more or less included in an order for a receiver.⁶⁸

§ 33. Appointment of Receiver Only when No Adequate Remedy at Law. A common-law court was originally the common forum for ordinary cases and complaints, and access to the king's chancellor was only possible when a suitor could not be properly taken care of by the king's ordinary or common-law courts and judges. This principle holds good today in England and America.

Since the appointment of a receiver is an equitable and extraordinary remedy it will not be allowed when an ordinary and legal remedy is open to the party asking for a receiver. All the courts, in most cases, hold that, until the plaintiff has ex-

⁶⁶ *Hayes v. Jasper Land Co.*, 147 Ala. 340, 41 S. 909.

⁶⁶ *Schack v. McKey*, 97 Ill. App. 460.

⁶⁷ *State, ex rel. Dauphin, v. Ellis*, Judge, 108 La. 521, at 531, 32 So.

335; cited in *Teutonia Bank & Trust Co. v. Security Brewing Co.* (1915), 137 La. 1046, at 1056, 69 So. 833.

⁶⁸ *Skidders Company v. Irish Society*, 1 My. & G. 162.

hausted his remedy at law, he has no standing in a court of equity to ask for a receiver.⁶⁹ A resort to a court of equity is allowed only in case of necessity, the legal remedy must be first exhausted.⁷⁰

In a proper case it is not necessary for a party to exhaust an apparent legal remedy before being entitled to a receiver, provided that it is shown such legal remedy is inadequate or would be ineffectual.⁷¹ The remedy must be plain, adequate and effectual.⁷² The remedy at law in order to exclude a concurrent remedy at equity must be as complete and efficient to the ends of justice and its prompt administration as the remedy in equity.⁷³

“An attachment at law when a statutory ground exists for its issue affords an ample redress and protection, in ordinary cases, as a receivership, fully securing the forthcoming of the property to answer any judgment obtained in the attachment suits if found liable to the attachment.”⁷⁴ Receiver will not be appointed without further grounds exist, when complainant can protect his rights by process of garnishment,⁷⁵ or when he might obtain judgment and have execution levied.⁷⁶ A court of equity will not interfere by the appointment of a receiver in favor of

⁶⁹ *Piatt v. Longworth*, 27 O. S. 159; *McClure v. McGee* (1908), 32 Ky. L. R. 1318; *Sylvester's Admr. v. Wilson's Admr.* (1905), 2 Alaska 325; *Cassidy v. Meacham*, 3 Paige 311; *Minkler v. Sheep Co.* (1895), 4 N. P. 507, 62 N. W. 594, 33 L. R. A. 546.

⁷⁰ *Gerry v. Gerry*, 63 N. Y. 252, at 256; *Davis v. Hayden* (1917), 238 Fed. 734, at 738.

⁷¹ *Pearce v. Jennings* (1891), 94 Ala. 524, at 527, 10 So. 511; *Brierfield Iron Wks. Co. v. Foster*, 54 Ala. 622; *Columbia Nat. S. D. Co. v. Washed Bar, etc.* (1905), 136 Fed. 710, at 712.

⁷² *Walla Walla v. Walla W. W. Co.* (1898), 172 U. S. 1, at 12, 43

L. ed. 341, citing *Boyce, Executor, v. Grundy* (1830), 3 Pet. 210, 215, 7 L. ed. 655; *Insurance Co. v. Bailey* (1871), 13 Wall. 616, at 621, 20 L. ed. 501; *Kilbourne v. Sunderland*, 130 U. S. 505, at 514, 32 L. ed. 1005; *Tyler v. Savage*, 143 U. S. 79, at 95, 36 L. ed. 82.

⁷³ *Twin City P. Co. v. Barrett* (1903), 126 Fed. 302; *Coler v. Board, etc.* (1898), 89 Fed. 257.

⁷⁴ *Pearce v. Jennings* (1891), 94 Ala. 524, at 527; see *Tumlin v. Van Horn* (1886), 77 Ga. 315, 3 S. E. 264.

⁷⁵ *Tumlin v. Van Horn* (1886), 77 Ga. 315, at 321.

⁷⁶ *Tumlin v. Van Horn* (1886), 77 Ga. 315, at 321, 3 S. E. 264.

a party who omits to avail himself of his legal remedy in due time.⁷⁷

Waiver of the Defense "Not Exhausted His Remedy at Law." That the complainant has not exhausted its remedy at law, for example, not having obtained any judgment or issued any execution thereon, is a defense in an equity suit which may be waived, and when waived, the case stands as though the objection never existed.⁷⁸ In such case the defense that the rights of the plaintiff at law should have been exhausted before commencing proceedings in equity is a defense which must be made in limine, yet if not so made, the court of equity is not necessarily ousted of jurisdiction.⁷⁹

Given a suit in which there is jurisdiction of the parties, in a matter within the general scope of the jurisdiction of the courts of equity, and a decree rendered will be binding, although it may be apparent that defenses existed which, if presented, would have resulted in a decree of dismissal.⁸⁰

Yet the court, for its own protection, may go a step farther⁸¹ and "sua sponte" may prevent matters purely cognizable at law from being drawn into chancery at the pleasure of the parties interested.⁸²

§ 34. Appointment of Receiver an Interlocutory Order.

The action of a court in granting a receivership does not determine the ultimate rights of the parties and should not even affect them, except so far as it preserves and retains control of the property to answer to the rights of the parties, as they may be

⁷⁷ *Drewry v. Barnes* (1826), 3 Russ. Ch. 94.

⁷⁸ *In re Met. Ry. Rec.*, 208 U. S. 90, 52 L. ed. 403.

⁷⁹ *Enos v. New York & O. R. Co.*, 103 Fed. 47; *Reynes v. Dumont* (1888), 130 U. S. 354, at 395, 32 L. ed. 934.

⁸⁰ *Hollins v. Brierfield C. & I. Co.*, 150 U. S. 371, at 380, 37 L. ed. 1113.

⁸¹ *Street Grading Dist. No. 60 v.*

Hadadorn (1911), 186 Fed. 457; *Lewis v. Cocks*, 23 Wall. 466, 23 L. ed. 70; *Oelrichs v. Spain*, 15 Wall. 211, 21 L. ed. 43; *Brown v. Lake Superior, etc.* (1890), 134 U. S. 530, 33 L. ed. 1021; *Allen v. Pullman P. C. Co.*, 139 U. S. 658, 662, 35 L. ed. 303; *Southern Pacific v. United States*, 200 U. S. 341, 50 L. ed. 507.

⁸² *Reynes v. Dumont* (1888), 130 U. S. 354, at 395, 32 L. ed. 934.

finally determined. The appointment of a receiver, therefore, is an interlocutory decree which leaves the equity of the case or some material question connected with it for future determination.⁸³

The appointment of a receiver after judgment to carry the judgment into effect is really an equitable execution and not strictly an interlocutory order.

§ 35. Appointment of Receiver a Provisional Remedy.

The appointment of a receiver being an interlocutory decree is, therefore, a temporary expedient, and provisional to some other or final determination of the matter by the court. It is only ancillary and auxiliary to the main action,⁸⁴ except in the rare case of lunacy or infancy.⁸⁵

It is not the office of a court of equity to appoint receivers as a mode of granting ultimate relief.⁸⁶ They are appointed as a measure ancillary to the enforcement of some recognized equitable right.⁸⁷

The remedy of a temporary injunction, like that of the appointment of a receiver, presupposes the existence of some actionable right to preserve or enforce which makes a temporary injunction or a receivership necessary.

Where Appointment of Receiver Is Apparently the Only Ultimate Relief Sought. There are a few cases to be found

⁸³ *Teaff v. Hewitt*, 1 O. S. 511; *Horn v. Pere Marquette Ry.*, 151 Fed. 626. For a full discussion of what is an interlocutory order with citations, see *Odell v. H. Batterman Co.* (1915), 223 Fed. 292, at 295.

⁸⁴ *Thoroughgood v. Georgetown Water Co.* (1910), 9 Del. Ch. 84, at 90, 77 Atl. 720; *Gauer v. Voltz* (1914), 190 Ill. App. 189; *Price v. Bankers Trust Co.* (1915), 178 S. W. 745; *Red River Potato, etc., v. J. W. Bernardy* (1914), 126 Minn. 440, 148 N. W. 449.

⁸⁵ *Price v. Bankers Trust Co.* (1915), 178 S. W. 745.

⁸⁶ *Folk v. United States* (1916), 233 Fed. 177, at 183; *Zuber v. Micmac Gold Mine Co.* (1910), 180 Fed. 625, at 627; *Vila v. Grand Island, etc., Co.*, 68 Neb. 233, 94 N. W. 136, 97 N. W. 613; *Joslin v. Williams* (1906), 76 Neb. 594, at 596, 107 N. W. 837.

⁸⁷ *Barber v. International, etc.* (1901), 73 Conn. 587, at 593, 48 Atl. 758; *Gauer v. Voltz* (1914), 190 Ill. App. 189, at 190; *Davis v. Jacksonville & P. Ry. Co.* (1913), 180 Ill. App. 1, at 13; *Martin v. Harnage* (1910), 26 Okla. 790, at 792, 110 Pac. 781.

in the books which at first reading might seem to hold that an original petition may be filed praying no further ultimate relief than the appointment of a receiver.

One important line of cases is in the English reports, wherein debenture holders' rights to the preservation of their securities are carefully considered. The English Companies Acts provide that companies can in certain cases issue so-called mortgage debentures called "floating securities." "The theory of these floating securities is that debenture holders shall not be entitled to interfere with the property comprised in their security until the events happen which are expressed in the deed."⁸⁸ The assets covered by the security can be used in the regular course of business, but when certain things happen, as is provided by the deed, the security crystallizes, that is, the claims of the debenture holders attach as lien rights.

That the court, on behalf of a debenture holder, may issue an injunction to preserve the security which is in danger of being lost,⁸⁹ was decided in 1868. Following this ruling, the English Chancery Court, in 1892,⁹⁰ in an action to enforce debenture securities appointed a receiver on the ground that such appointment was absolutely necessary for the protection of the debenture holders' security. In 1893⁹¹ the English Court of Chancery again, before the mortgage money had become due, in an action by the holders of the mortgage debenture for a declaration that the securities be a first lien, and that an account be taken, and to enforce the securities, appointed a receiver to preserve the property. It will be found in all these cases that some relief, other than the appointment of a receiver, was prayed for.

A few American cases are found which at first reading seem to hold that a receiver may be appointed when the original

⁸⁸ *Thorne v. Nine Reefs, Ltd.* (1892), 67 L. T. (N.S.) 94.

⁸⁹ *Wildy v. Mid-Hants Ry. Co.* (1868), 18 L. T. R. 73.

⁹⁰ *McMahon v. North Kent Iron Works Co.* (1892), 2 Ch. D. 148.

⁹¹ *Edwards v. Standard Rolling Stock, etc.* (1893), 1 Ch. D. 574.

action was brought solely for the purpose of appointing a receiver until foreclosure could be brought. Such an action has been called an anomaly.⁹² Justice Brewer seems to have held orally that in a case where default is about to take place and where suits were likely to be brought in different territories, the court might anticipate and take possession of the property and preserve it intact in order to permit the general mortgagee, when default actually occurred, to file its bill for foreclosure and have the property as an entirety sold. What Judge Brewer did was to allow the property to be preserved for and in behalf of a lienholder. It is impossible to tell upon the verbal report of Justice Brewer the technical status of the several suits. It would seem, however, that jurisdiction was acquired by a so-called adversary suit or suits, and that the preservation of the property was in fact, if not in theory, in aid of the enforcement of some primary right claimed by some party to a suit before the court. It would seem that when a litigant has a right to the preservation of property he may ordinarily ask for an injunction against a violation of his rights. Before granting the permanent injunction the court, to preserve the property, may at its discretion grant a temporary injunction or appoint a receiver.

Cases where the courts have preserved property by a receiver when an injunction and receiver are prayed for, may be found below.⁹³ In *Mercantile T. Co. v. Missouri, K. & T. Ry.*, 1888.⁹⁴ Justice Brewer suggests that a suit to preserve property may be brought even before default on the mortgage money, and if properly brought a receiver could be appointed ad interim.

In 1905, *Holland, J.*, of Eastern District of Pennsylvania,⁹⁵ says, "When facts recited in a bill charging mismanagement show that the board of directors who are responsible for the mis-

⁹² *Wabash St. L. v. Central Trust Co.* (1885), 23 Fed. 513.

⁹³ *Long Lock Co. v. Mallery* (1858), 12 N. J. Eq. 431; *Brassey v. New York & N. E. R. Co.* (1884), 19 Fed. 663.

⁹⁴ *Mercantile T. Co. v. Missouri Ry.* (1888), 36 Fed. 221.

⁹⁵ *Columbia N. S. v. Nashid, etc.* (1905), 136 Fed. 710, at 712.

management are the majority stockholders, and that they are managing the corporation for their own benefit and diverting its funds and income to themselves, the minority stockholders, or any of them, would be entitled to relief, either by injunction, where that remedy could correct the evil, or, if necessary, the appointment of a receiver."

Injunctions are of two kinds, temporary and permanent. A temporary injunction is an ancillary or provisional remedy and may be granted pending an action for a permanent injunction in any other action. A temporary injunction is a matter to be granted at the discretion of the judge. It is a remedy rather than a right. A right to have property preserved against injury and other rights may be granted by the court issuing a permanent injunction.

A litigant may have a right to a permanent injunction. A permanent injunction may be the final and ultimate relief asked for; a permanent injunction may be demanded to preserve property temporarily or provisionally to some ultimate relief asked for. But a permanent injunction may be the final relief demanded and prayed for. A permanent injunction may be demanded as necessary to preserve property or property rights and be as much final and conclusive as any other relief demanded.

The applications for the appointment of the receiver and the issuing of temporary injunctions are at times granted by courts pending the issuing of permanent injunctions.

On the other hand when a permanent injunction is asked for, it may be necessary for the court to appoint a receiver of the property pending the hearing of the formal injunction."⁶⁶

§ 36. Appointment of Receiver Ancillary to the Main Suit. The appointment of a receiver is not an equitable right but an equitable remedy, therefore the appointment of a receiver is not a cause of action in itself, but the appointment of a receiver is an act of the court ancillary to proceedings for the estab-

⁶⁶ Gray, Attorney General, v. Council, etc. (1911), 9 Del. ch. 171, 79 Atl. 735.

ishment of some right.⁹⁷ These are apparent exceptions to this rule, which exceptions are discussed in sec. 35, *infra*, this chapter.

§ 37. Appointment of Receiver Sometimes an Equitable Execution. The appointment of a receiver is often called an equitable execution,⁹⁸ or species of execution.⁹⁹ The function of an execution is to realize the property of the defendant to satisfy the plaintiff's judgment and in the nature of things an execution can only issue after judgment. The issuing of an execution and a levy thereunder gives the execution creditor a lien on the property.

When a receiver is appointed before judgment and *pendente lite* and this is the more often, the object, with few exceptions, is not to realize the property by the appointment, but to preserve it. Furthermore, when such a receiver is appointed, the plaintiff, if he has no judgment or lien before the appointment, acquires none by the appointment. And when the property under such a receivership is distributed the plaintiff generally gains no priority over other parties who come in after the receivership and show a valid claim.^{99a}

Therefore the appointment of a receiver before judgment and *pendente lite* is not by way of equitable execution except possibly in a few cases of realization of rent charges, collection by receivers of unpledged rents, etc.

However, in cases where the debtor has an equitable interest in land or other property, which can not be taken in execution by any of the modes ordinarily used by common-law courts, such as a levy under execution on the property, attachment or other process, an order may be obtained appointing a receiver

⁹⁷ *Toomey v. First Mtg. T. Co.* (1915), 177 S. W. 539; *Continental Trust Co. v. Brown* (1915), 179 S. W. 939; *Davis v. Railway Co.* (1913), 180 Ill. App. 1; *Vila v. Grand Island, etc., Co.*, 68 Neb. 233, 94 N. W. 136, 97 N. W. 613; *Joslin v. Williams* (1906), 76 Neb. 594, at 596, 107 N. W. 837; *Zuber v. Micmac Gold Mine Co.* (1910), 180 Fed. 625, at 627; *Barber v. Interna-*

tional Co. of Mexico (1901), 73 Conn. 587, at 593, 48 Atl. 758.

⁹⁸ *C. S. & C. R. R. v. Sloan*, 31 O. S. 1.

⁹⁹ *State, ex rel. Dauphin, v. Ellis, Judge*, 198 La. 531, 32 So. 335; cited in *Teutonia Bank & Trust Co. v. Security Brewing Co.* (1915), 137 La. 1046, at 1056, 69 So. 833.

^{99a} See sec. 38, *infra*, this chapter.

to receive the debtor's interest in the property and so make it available for satisfaction of the judgment. This is commonly called an "equitable execution."¹

The term "equitable execution," as applied to receivership must, from the above statement, be restricted to receiverships for the purpose of enforcing a judgment; the term "equitable execution" can not very well apply to receivers of a fund to preserve it only, or to other cases where receivers are appointed, not to carry a judgment into effect, but simply to preserve property.

Says Cotton, L. J., concerning a receivership being an equitable execution: "What is commonly called equitable execution is not in fact execution but equitable relief, which is granted because there is a hindrance in the way of execution at law and it is subject to the ordinary rule that equitable relief can be granted only when proper parties are before the court."²

Says Lord Esher, M. R.. "Equitable execution is a process which gives to the judgment creditor that to which the judgment has given him a right and does away with the difficulty of his getting possession of it. You, the receiver, are to receive that property, or that money, into your possession. So far as you are concerned you are to hold it for, and will have to hand it over to the judgment creditor and nobody else. But as it may be that some other person will come before us, or that some other point will be taken with respect to the right to the property or money, we will not at once make the order for you to hand or pay it over."³

§ 38. When Appointment of Receiver Amounts to an Equitable Lien. When a receiver is appointed *pendente lite* the purpose is to preserve the property for the persons or persons who at the termination of the receivership shall be held by the

¹ Stephens' Commentaries on the Law of England, Vol. III, p. 566; see *Johnson v. Garner* (1916), 233 Fed. 756, at 776.

² In re Shepard (*Atkins v. Shepard* (1889), 43 Ch. D. 131.

³ *Levasseur v. Mason* (1891), 2 Q. B. D. 73, at 78.

court entitled to the property. And in such cases the property is divided and distributed among those who become parties to the action or present their claims to the court. There are cases, however, where the party at whose instance a receiver is appointed by his vigilance thereby obtains an equitable lien. When this occurs the plaintiff in the proceeding secures a receiver, not to preserve the property only, but to realize it.

In England, when a receiver is appointed over mortgaged or otherwise encumbered premises, the order generally contains a declaration to the effect that the appointment is to be without prejudice to the rights of or is not to affect any prior encumbrancers on the estate, who may think proper to take possession of it by reason of their respective securities, and it usually directs the receiver, out of the rents and profits to be received by him, to keep down the interest and payments in respect of such incumbrances according to their priorities.⁴ It must be borne in mind that in England the first encumbrancer has a legal right to the property. However, if the mortgagee is not in possession by his receiver, at the time when the execution is issued by a judgment creditor, the judgment creditor may take the rates and tolls then due, but as to the rates and toll thereafter to become due, he will be stopped at any time by the mortgagee entering into possession by his receiver.⁵

In America, generally, the first encumbrancer has no legal right to the estate of the mortgagor until sale of the same under foreclosure proceedings. Nevertheless, most courts in the United States hold that a mortgagee whose debt is all due and is effectively secured by filing his mortgage and procuring a receiver obtains an equitable lien on the unpaid rents of the lands mortgaged,⁶ and furthermore, as to the second mortgagee, the follow-

⁴ Seton on Judgments, 7th ed., p. 765-768; see *Louis v. Zouche*, 2 Sim 388; *Smith v. Earl of Effingham* (1839), 2 Beav. 232; *Underhay v. Read* (1887), 20 Q. B. D. 209.

⁵ *Ames v. Birkenhead Docks* (1855), 20 Beavan, 332, 348, 352; Act (1854),

17 and 18 Vic. ch. 125; Act (1883), 46 and 47 Vic. ch. 49, replaced by R. S. C. Ord. XLV.

⁶ *Lefsky v. Mayer*, 3 Sanf., ch. 69; see *Usborne v. Limenek Market Trustees* (1899), I. R., Vol. I, p. 238.

ing doctrine was laid down by the New York Chancery Court in 1843,⁷ and is generally followed in this country.

In *Howell v. Ripley*,⁸ a junior mortgagee filed his bill to foreclose and had a receiver appointed. Afterwards a prior mortgagee filed his bill for the same purpose and had a receiver appointed also. The New York Chancery Court held that the prior mortgagee was only entitled to the rents and profits due at the time of the appointment of the receiver in his suit, and to such as accrued thereafter, and that the junior mortgagee was entitled to all the rents and profits in the possession of the receiver in his suit at the time the receiver in the suit of the prior mortgagee was appointed.

§ 39. Appointment of Receiver More than a Sequestration.

A sequestration is only a process to compel an appearance, the performance of a duty. You will not find any instance of an order to sell under a sequestration a subject which passes by title and not by delivery.⁹ Previous to modern statutes upon the subject, the only way of enforcing a decree in chancery was the attachment of the person and sequestration of his property. The defendant was deemed to be in contempt for not obeying the decree, and the first process against him for such contempt was a writ of attachment, and if for any reason he could not be taken and imprisoned upon the attachment, or if, being imprisoned, he still refused to perform, the writ of sequestration would be issued, under which sequestrators could seize and sell his personal property and take and receive the rents and profits of his real estate.¹⁰

Before the act abolishing imprisonment for debt, this method was used to enforce a money decree against a party who refused to pay. Most states have abolished imprisonment for debt,¹¹ and also passed acts providing for the enforcing of decrees in equity

⁷ *Howell v. Ripley* (1843), 10 Paige 43.

⁸ *Howell v. Ripley*, 10 Paige 43; *Lefsky v. Mayer*, 3 Sandf., ch. 69; same holding, *Williamson v. Galack*, 41 Ohio St. 682-684; also *Ranney v. Peyser* (1880), 83 N. Y. 1.

⁹ *Shaw v. Wright*, 3 Ves. 22.

¹⁰ *Geery v. Geery* (1875), 63 N. Y. 252.

¹¹ *Geery v. Geery* (1875), 63 N. Y. 252, at 255; *Hosack v. Rogers* (1845), 11 Paige 603.

by execution in the same manner as judgments at law. In some states court rulings take the place of statutes on the subject.¹² Therefore, it may well be doubted whether a decree for the payment of money can be enforced by attachment of the person or sequestration.

A Louisiana court has said: "An order for the appointment of receiver is more comprehensive in its effects than either an attachment, a sequestration, or an injunction, or, in fact, than all of those writs combined, and is said to reverse the ordinary course of procedure in the administration of justice by levying a species of execution and determining afterward who is entitled to the benefits."¹³

Receivership More like Sequestration than Execution. It is said by Farmington, District Judge:¹⁴ "A receivership does not operate as an attachment or an execution. It is no more than a general sequestration of property for safe keeping, leaving the question as to who is entitled thereto to subsequent determination."¹⁵

§ 40. Distinction between Sequestration and Appointment of Receiver. Sequestration is a process after decree for the enforcing of the decree. A receiver is generally appointed *pendente lite*, before the decree for the purpose of preserving the property for the decree to act on which the decree is rendered. A receiver appointed "after judgment to carry the judgment into effect,"¹⁶ is not really a *pendente lite* receivership, but may be construed to embrace all cases of sequestration of property in which the old writ was formerly issued. That is to say, instead, as was formerly done, of issuing such writ and sequestering the property of the defendant, who is in contempt

¹² *Geery v. Geery* (1875), 63 N. Y. 252, at 255; Ohio Constitution (1851), Art. I, sec. 15. See *White v. Gates*, 42 O. S. 109.

¹³ *State, ex rel. Dauphin, v. Ellis*, Judge, 108 La. 531, 32 So. 335, cited in *Teutonia Bank & Trust Co. v. Se-*

curity Brewing Co. (1915), 137 La. 1046, at 1056, 69 So. 833.

¹⁴ District Judge, Nevada, 1916.

¹⁵ *Johnson v. Garner* (1916), 233 Fed. 756, at 776.

¹⁶ See statutes defining such receivers, Ohio General Code, sec. 11894, sec. 3.

for disobeying a judgment, and who persists in his disobedience, the simpler and no less efficient remedy of appointing a receiver over such property may be adopted. Such receiver has more powers than the old sequestrator. Among other things he can sue.¹⁷

A sequestration takes hold of personal property and rents and profits of real property. A receivership takes hold of both personal and real property.

A sequestrator can not sell a subject which passes by title. A receiver can sell a subject which passes by title.

Sequestration has been practically abolished in New York and most states.¹⁸ Receiverships are growing and developing in Great Britain and in the United States.

§ 41. Distinction between Execution and Appointment of Receiver. A sheriff's possession in case of an execution issued is by reason of an order from the court commanding him to levy on the land.¹⁹ An execution creates a lien. The appointment of a receiver pendente lite gives possession to the court but creates no lien in favor of the party on whose motion a receiver is appointed.

Under a levy of an execution, a sheriff has a right to the possession of property and a qualified property as bailee of the law; he may protect and assure that possession by action of trespass against a tort-feasor or bring detinue or replevin against him who tortiously deprives him of possession, or defend the possession thereof against one not the owner.²⁰ These remedies are afforded him in order that he may obey the precept of the law, by converting the property into money for the creditor. What the law aims at is to realize the money for the creditor.²¹ A receiver has possession for the court for he is the arm of the court; he does not technically protect and assure the possession

¹⁷ Brinton v. Wood (1859), 19 How. Pr. 162, New York Civil Code.

¹⁸ Hosack v. Rogers (1849), 11 Paige 603.

¹⁹ Morgan v. Kinney (1883), 38 O. S. 610, at 614.

²⁰ Dunkin v. McKee, 23 Ind. 447.

²¹ Parker v. Dean, 45 Miss. 408, at 419.

for himself, but, upon application, the court itself will protect its possession of the property by a proceeding of contempt against one interfering with possession. It is contempt of court for a third person to attempt to deprive the receiver of that possession by force or even by a suit or other proceeding against him without the permission of the court by whom the receiver was appointed.²² Furthermore, the appointment of a receiver does not ordinarily aim at realizing money for the creditor; it aims at protecting the property for all creditors who may prove themselves entitled to share in it or in the proceeds of a sale of the property. It has been held that in the case of an execution where property is sold and there is a surplus, this may be attached on the theory that the surplus will not be brought into court by the sheriff.²³ Where property in the hands of a receiver is sold and the proceeds are more than enough to pay those entitled, the remainder can not be appropriated by the owner or a creditor of the owner until and except by an order of court.

A sheriff in charge of property under power of an execution and a levy thereunder must surrender the property to a duly qualified receiver of the same.²⁴ A sheriff can not levy an execution on property in the hands of a receiver. Such an act would be contempt of court and a receiver can not ordinarily be compelled to surrender property to a sheriff.

In the case of a levy of an execution which creates a lien, the general property remains in the defendant.²⁵ He may, therefore, after, as before the levy, convey the title to the property; the only difference being that after the levy the title received by the vendee is liable to be divested by the sale under the levy. In the case of a receivership, however, the property in the hands of a receiver can not be sold by the owner, because possession and custody of the property has been taken from the owner and

²² Walling v. Miller, 108 N. Y. 178, 15 N. E. 65.

²³ Pierce v. Carleton, 12 Ill. 358.

²⁴ Gorman v. Finn, 56 N. Y. App. Div. 155; affirmed, 171 N. Y. 628, 63 N. E. 1117; also Matter of Jen-

sen Co., 128 N. Y. 550, 28 N. E. 665; Matter of Lewis, et al., 89 Hun, 208; Walling v. Miller, 108 N. Y. 178, 15 N. E. 65.

²⁵ Pierce v. Kingswell, 25 Barb. 631.

placed in the hands of the court, and any interference with such property or the title to the property is contempt of court.

All the cases hold, however, that the sheriff acts for and in behalf of the plaintiff in the execution and that the plaintiff is the substantial party, the one immediately and directly interested in the levy and the property or money acquired by virtue thereof. The defendant, as sheriff, has such a special property by virtue of his levy as will enable him to maintain trespass or trover against a stranger who wrongfully interferes with the property.²⁶ A receiver, however, acts for the court and the court acts and holds the property for the plaintiff and all parties who may prove a valid claim to it, including the defendant or defendants. Any interference is against the court rather than against the receiver, either officially or personally.

§ 42. Distinction between Attachment and Appointment of Receiver. An attachment is essentially a proceeding in rem when no personal service is had,²⁷ and a wholly statutory proceeding²⁸ issuing out of a common-law court.²⁹ A receivership was originally and is essentially a proceeding in personam, although it may, in certain cases, be in the nature of a proceeding in rem.³⁰ It was originally a chancery proceeding without any statute controlling the same. Today, however, there are statutes in New York and other states governing the remedy but not making it any less a chancery or equitable proceeding.

In case the plaintiff secures an attachment on the debtor's property, he secures a lien on the same until his claim is adjudicated. In case the plaintiff secures the appointment of a receiver for the debtor's property, he secures the right to have the property held and protected in custodia legis to abide by the final judgment of the court and to be applied not only to plaintiff's claim but to the claim of others.³¹

²⁶ Howland v. Willetts, 9 N. Y. 170.

²⁷ Shinn on Attachment, sec. 5.

²⁸ Shinn on Attachment, sec. 8.

²⁹ Shinn on Attachment, sec. 7.

³⁰ Dorrier v. Masters, 83 Va. 459, 2 S. E. 927.

³¹ Atlantic T. Co. v. Chapman (1907), 207 U. S. 376, 52 L. ed. 528; McNulta v. Lochridge (1891), 141 U. S. 327, 35 L. ed. 796. See sec. 37, *supra*, this chapter.

The use of property, if attached during the pendency of proceedings remains in the debtor if land and all the profits and fruits of the same are the debtor's, because the plaintiff has no vested interest in the property which would prevent the debtor using the property. The possession, therefore, of land has always been suffered to remain in the debtor unmolested so long as he contented himself with ordinary³² use of the property. If personalty, and can be reached, the sheriff is generally, by statute, to take it into his custody.³³ In a receivership case, however, the receiver takes custody and possession of the debtor's property to the exclusion of the debtor, and the receiver collects the rents and profits and furthermore preserves the property. A debtor whose real property is attached may alienate such property subject to the lien of the attachment.³⁴ Property under attachment may be sold by the general owner. It is founded on the great principle lying at the foundation of the right of property that general ownership carries with it a full power of disposition, and when such ownership is not taken away but only limited, as in case of a lien, the power of disposing still remains, subject only to the lien.³⁵ A debtor whose property is in the hands of a receiver can not ordinarily alienate it. He certainly can not alienate it when he has assigned it to the receiver or when, by law or by statute, the title of both personalty and real estate vests in the receiver. An order appointing a receiver is in the nature of an injunction or writ of sequestration, preventing any alienation of or interference with the property without consent of the court. A receivership is a species of injunction against any interference with the property by anyone, and the effect of the appointment of a receiver is to remove the parties to the suit from the possession of the property, notwithstanding the right to the property is in no way affected. The

³² *Camp v. Bates*, 11 Conn. 51.

³³ For example of such a statute, see Ohio General Code, sec. 11826.

³⁴ *Ware's Admr. v. Russell*, 70 Ala. 174; *First Ward Bank v. Thomas*, 125 Mass. 278, at 281.

³⁵ *Appleton v. Bancroft*, 10 Met. 231.

court's jurisdiction attaches to the property described in the order and to real estate, though it is not specifically described.³⁶

If the sheriff, under a writ of attachment, seizes property which is in possession of the defendant in the suit, and therefore presumptively his, third persons claiming such property can ordinarily, after demand, sue the sheriff and recover if they can show title. But when a receiver is in possession of property that he is specifically directed by the court to take and which is claimed to belong to the party whose goods are sequestered, and such possession has been acquired without the commission of a trespass, the receiver can not be held personally responsible as a trespasser by a third party upon demand and a refusal to give up the property. The sheriff is the agent of the creditor. He commits no contempt if he refuses to levy upon goods which he has reason to believe do not belong to the debtor. He may release them to a claimant without being guilty of a contempt; he simply takes the responsibility. The receiver has no such discretion. If the goods are described and are in the possession of the party whose property he is directed to take into possession, or are voluntarily delivered to him by the person having them, he must take them on pain of incurring a contempt, and having thus taken them, he can not surrender them to an adverse claimant without leave of the court, which is the real custodian.³⁷

³⁶ *Cheney v. Maumee Cycle Co.*
(1901), 64 O. S. 205, 60 N. E. 207.

³⁷ *Tapscott v. Lyon*, 103 Cal. 297,
37 Pac. 225.

CHAPTER III

JURISDICTION IN THE APPOINTMENT OF RECEIVERS

ANALYSIS

- § 43. Jurisdiction Defined
- § 44. Jurisdiction to Appoint Receiver Inherent in Courts of Equity.
- § 45. Jurisdiction when Main Cause Pending in Another Court.
 - (a) Receiver when Probate Proceedings Pending in Other Court.
 - (b) Receiver of Property in Litigation in Foreign Court. . .
 - (c) Injunction when Main Cause Pending in Other Court.
- § 46. No Jurisdiction in Case Involving Only Legal Right.
- § 47. Jurisdiction Only over Property the Subject of Litigation.
- § 48. Equity Acts in Personam.
- § 49. Equity Does Not Directly Establish Title.
- § 50. When Jurisdiction of the Property Commences.
 - (a) Real Estate.
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- § 51. Territorial Limitation of State Court in Appointing Receiver.
- § 52. Territorial Limitation of United States Court in Appointing Receiver.
- § 53. Order Appointing Receiver of Realty Has no Extraterritorial Operation.
- § 54. Order Appointing Receiver of Personalty—What Extraterritorial Effect.
- § 55. Statute Making Equity Decrees as to Title Self-Executing.
- § 56. Territorial Limitations of Decrees which Operate as Conveyances.
- § 57. Quasi Jurisdiction of Equity over Foreign Property.
- § 58. Decrees in One State Binding on Courts in Another State.
- § 59. Enforcement of Decrees Operative Outside of State.
- § 60. Jurisdiction of Receivers within State.
- § 61. Appointment of Receiver over Nonresident's Property.
- § 62. Concurrent Jurisdiction of Courts in General.
- § 63. Concurrent Jurisdiction of United States and State Courts.
- § 64. Concurrent Jurisdiction of State Courts.
- § 65. Jurisdiction to Modify Order of Appointment.
- § 66. Jurisdiction to Remove Receiver.

- § 67. Jurisdiction to Appoint Successor to Receiver.
- § 68. Jurisdiction of Court Continues though Personnel of Receiver Changes.
- § 69. Exclusive Jurisdiction of Appointing Court.
- § 70. Effect of Want of Jurisdiction.
- § 71. Consent Can Not Confer Jurisdiction to Appoint Receiver.
- § 72. Property Which May Be Taken by Receiver.
- § 73. Jurisdiction of Court Appointing Receiver in Collecting Assets.
- § 74. Courts without Statute Have No Jurisdiction after Dissolution of Corporation.
- § 75. Collateral Attack On Appointment of Receiver.
- § 76. Jurisdiction over Property Taken by Receiver under Color of Authority Only.
- § 77. When Court Has Wrongfully Taken Possession.

§ 43. Jurisdiction Defined. Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials:

First. The court must have cognizance of the class of cases to which the one to be adjudged belongs.

Second. The proper parties must be present.

Third. The point decided must be in substance and effect within the issue.

That a court can not go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities.¹

There can be no such thing as judicial authority unless it is conferred by a government or sovereignty.²

§ 44. Jurisdiction to Appoint Receiver Inherent in Courts of Equity. By the usages and rules of equity all chancery courts or equity courts or courts having general equity jurisdiction have inherent power to appoint receivers in ordinary equitable adversary cases, to preserve property and at times to preserve, realize and administer the property of idiots, lunatics,

¹ Reynolds v. Stockton (1890), 140 U. S. 268, 35 L. ed. 464.

² Ableman v. Booth (1858), 21 How. 506, Taney, J., 16 L. ed. 169.

children and the deceased in *ex parte* proceedings where there is in fact no adverse litigation pending.³

Such courts, above mentioned, may by statute have their powers of appointing receivers extended beyond the well-recognized usages and rules of equity and they may likewise but do not in fact often have their powers limited.

Other courts not having general equity jurisdiction may by statute be given the same power to appoint receivers as the above-mentioned courts or may be given restricted or enlarged powers.⁴

A litigant has no absolute right to the appointment of a receiver, for the appointment of a receiver is a remedy applied by the court. Before a court can grant the extraordinary remedy and relief of appointing a receiver there must be a case pending before the court upon which the court can predicate its relief.⁵

The first jurisdictional question, therefore, is, Has the court jurisdiction of the main cause of action and of the subject-matter of the action and of the parties to the action? ⁶

It is always the duty of the court to look to the jurisdiction and determine it.⁷

If at any time it appears to the court that it is without jurisdiction it shall dismiss the suit or remand it to the original court.⁸

“So when an application is made for appointment of a receiver, it becomes all the more necessary to look immediately to the question of jurisdiction, lest if one be appointed other perplexities arise that might embarrass the court if it should

³ See ch. VI.

⁴ See Vol. 2, ch. XXXV, *infra*.

⁵ The various subjects treated of in this whole chapter are necessarily closely related to the subject of this paragraph.

⁶ See exceptions and *ex parte* proceedings referred to in this section.

⁷ *Ryder v. Bateman* (1898), 93 Fed. 16, at 23.

⁸ *Ryder v. Bateman* (1898), 93 Fed. 16, at 23; United States Act of 1875, sec. 5 (18 Stat. 472); see *Morris v. Gilmer*, 129 U. S. 315-325, 32 L. ed. 690; *Cameron v. Hodges*, 127 U. S. 322, 326, 32 L. ed. 132; *Graves v. Corbin*, 132 U. S. 571, 590, 32 L. ed. 462; *Crehore v. Railway Co.* (1889), 131 U. S. 240, 33 L. ed. 144.

turn out there was at the beginning no jurisdiction of the case." For the effect of seizure of property without jurisdiction and dismissal of main suit, see sec. 70, *infra*, "Effect of Want of Jurisdiction."

§ 45. Jurisdiction when Main Cause Pending in Another Court. It is not in accordance with the usages and rules of courts of equity to appoint a receiver when suit is pending in a tribunal other than the court in which the action was brought.¹⁰ The reason for this proposition is that the appointment of a receiver is not a right of a litigant but an auxiliary, or provisional remedy to be applied by the court, and such remedy is based on a main suit. It is the filing of the main suit which enables the court in which the main suit is filed to take jurisdiction and make the order appointing a receiver of the property in litigation. If there is no main suit and no ultimate relief asked, there is no calling forth the power of the court to act.¹¹

There are statements¹² and cases which might seem to indicate at first blush that an equity court can give ancillary aid to an action in another court by the appointment of a receiver.¹³ Upon a close study of these cases¹⁴ it will be disclosed that there is a distinction between the granting of an injunction or other final relief by one court to preserve property in litigation in another court¹⁵ and directly granting a receivership in one court to preserve property in litigation in another court. When an injunction or other final relief is asked for

⁹ *Ryder v. Bateman* (1898), 93 Fed. 16, at 23.

¹⁰ *Martin v. Harnage* (1910), 26 Okla. 790, 110 Pac. 781; see *In re Hancock* (1882), 27 Hun, 575.

¹¹ See exceptions when equity courts act with no ultimate relief asked for, ch. VI, "Receivers of Estates."

¹² See note to *Martin v. Harnage* (1910), 38 L. R. A. (N.S.) 228, 26 Okla. 228, 110 Pac. 781.

¹³ *Underground Elect. Ry. v. Owlsley* (1909), 176 Fed. 26, at 34; also cases cited in note, *Martin v. Harnage*, 38 L. R. A. (N.S.) 228.

¹⁴ Cases cited in note, *Martin v. Harnage*, 38 L. R. A. (N.S.) 228.

¹⁵ *Lamar v. Alison* (1887), 31 Fed. 100; *Erhardt v. Boaro* (1885), 113 U. S. 528, 28 L. ed. 1113; *Pillsworth v. Hopton*, 6 Ves. 51; *Jerome v. Ross*, 7 Johns. Ch. 315-322; *LeRoy v. Wright*, 4 Saw. 530, at 535.

and thereby a main cause is pending a receiver may be appointed as auxiliary to the main injunction suit.

The proposition that a court can appoint a receiver merely to administer or preserve the property when no action asking for some affirmative or negative relief is asked is against all recognized rules and usages of equity and against the fundamental principles of jurisprudence under our form of government. It is the duty of the executive under the English form of government and under our federal and state governments to preserve order and preserve property and not primarily the court's duty. When a court administers or preserves property it is not its normal function. A court may administer and preserve property of a deceased, of an idiot, lunatic, or minor, because there is no other person who is in a position without appointment from the court to act.¹⁶

A court may take possession of and administer and preserve a bankrupt's property because the federal constitution says it may.¹⁷

It may also be said that the English Judicature Act of 1873¹⁸ has enlarged the jurisdiction of various courts to appoint a receiver and enable the courts therein mentioned to act with greater freedom and to make receivership orders in all cases where it is just or convenient. Under this power the chancery court has appointed a receiver in a creditor's action brought

¹⁶ See ch. VI, "Receivers of Estates."

¹⁷ In *Underground Electric Ry. Co. v. Owsley* (1909), 176 Fed. 26, at 34, Noyes, Circuit Judge, speaking for the Circuit Court of Appeals for the Second Circuit, commenting on the statement that, "The appointment of a receiver is not the ultimate end and object of litigation, but a provisional remedy or an auxiliary proceeding," says: "Still we think that this merely means that there must be litigation in some court to which the receivership is auxiliary and does not neces-

sarily require that it should be in the court of equity itself."

Upon examination of *Underground Electric Ry. v. Owsley* (1909), 169 Fed. 671, the original case, it will be found that the petition, besides asking for a receiver, asked that Owsley be restrained from further prosecuting his petition for ancillary letters in New York. Thus final relief was really asked for in the shape of a permanent injunction, and the receivership was merely auxiliary to this final relief.

¹⁸ English Judicature Act (1873), s(25) 8, 36 and 37 Vic. ch. 66.

in the Chancery Court of England before grant of probate administration notwithstanding the absence of *lis pendens*.¹⁹

(a) Receiver when Probate Proceedings Pending in Other Court. Formerly the Probate Court of England did not have power to protect the property during litigation as to administration and a receiver was appointed by a court of equity simply to protect the property while the suit was pending in the other court, namely the probate, ecclesiastical or other court. The Probate Act of England²⁰ and similar acts in most of our states have given probate courts power to protect property during litigation.²¹ Nevertheless the jurisdiction of chancery courts to protect property under such conditions has not been done away with.²²

When the court of equity so preserves the property it does so because there is no one else to hold the property. The power of the court to protect property of idiots, lunatics, children and the deceased really dates back to the original power to do so held by the king and transferred to the chancellor, first the king's secretary and later on a judicial officer of the king.

(b) Receiver of Property in Litigation in Foreign Court. When the title or claims to property located in one country or in one state is being litigated in another foreign jurisdiction, a suit for an injunction or accounting or other proper suit asking for final relief may be brought in the jurisdiction where the property is located. In such a case it is often proper for the court to appoint a receiver.²³

¹⁹ *In re Parker* (1885), 54 L. J. Ch. 694; *In re Wange* (1911), *The Weekly Notes*, 129; Halsbury, *Laws of England*, Vol. 24, p. 424; Halsbury, *Laws of England*, Vol. 24, p. 353; *Salter v. Salter* (1896), 1 P. D. 291.

²⁰ *Veret v. Puprez* (1868), L. R. 6 Eq. 329; *Hitchens v. Birks* (1870), L. R. 10 Eq. 471, at 475.

²¹ *Hitchens v. Birks* (1870), L. R. 10 Eq. 471, at 475.

²² *Hitchens v. Birks* (1870), L. R. 10 Eq. 471, at 475; *Parkin v. Seddons* (1873), 16 Eq. Cases 34.

²³ *Transatlantic Co. v. Pietroni* (1860), Johns. (Eng.) 604; *Law v. Garrett* (1878), 8 Ch. D. 27; *Evans v. Puleston*, W. N. (1880), 89, 127; *Mini v. Roncoroni* (1892), 1 Ch. 633; *The Compagnie du Senegal v. Woods*, 52 L. J. Ch. 167.

(c) Injunction when Main Cause Pending in Other Court.

Says Chancellor Bland of the Chancery Court of Maryland, 1857:²⁴ An injunction to stay waste while an action at law is being tried between the same plaintiff and defendant in another case in all respects performs the office of the ancient writ of estrepement. It is an attendant upon the action at common law; and, as its inseparable ally, follows its fortunes, and must submit to its fate.

A chancery court will aid an attaching creditor to enforce the lien of the attachment by injunction and otherwise on the same principle that it aids execution creditors similarly obstructed.²⁵ Contra, the Missouri courts hold that an attaching creditor stands on no better ground than one who sues out an ordinary process of the court.²⁶

§ 46. No Jurisdiction in Case Involving Only Legal Right.

A line of California cases holds flatly that in a case involving merely legal as distinguished from equitable rights the law does not authorize the appointment of a receiver.²⁷ However, even in California where receivers have been appointed of a partnership in an action for merchandise sold and delivered and for money loaned and such receivers have served for nearly a year without question from the complainant or any other creditor the appointment has been upheld.²⁸

The appointment of a receiver is an equitable remedy.²⁹ Being an equitable remedy only a court of equity or chancery

²⁴ *Hill v. Bowie* (1826), 1 Bland Ch. (Md.) 593; *Duvall v. Waters* (1827), 1 Bland Ch. (Md.) 569; see *Wadsworth v. Goree*, 96 Ala. 227, 10 So. 848; *Johnson v. Hall*, 83 Ga. 281, 9 S. E. 783; *Cromwell v. Hughes*, 144 Mich. 3, 107 N. W. 323.

²⁵ *Falconer v. Freeman* (1847), 4 Sandf. Ch. 565; *People, ex rel. Cauffman, v. Van Buren* (1892), 136 N. Y. 252, at 261, 20 L. R. A. 446, 32 N. E. 775.

²⁶ Contra, *Martin v. Michael* (1856), 23 Mass., at 56.

²⁷ *First National Bk. v. Superior Court* (1909), 107 Pac. 322, 12 Cal. App. 335.

²⁸ *San Jose Bk. of Savings v. Bank of Madera* (1898), 121 Cal. 543, 54 Pac. 85; *Smith v. Superior Court* (1893), 97 Cal. 348, 32 Pac. 322; *Scott v. Sierra Lumber Co.*, 67 Cal. 76, 7 Pac. 131; *Bateman v. The Superior Court* (1880), 54 Cal. 285; see also 38 L. R. A. 232, 78 N. Y. Supp. 763, 6 How. Pr. 456, 10 How. Pr. 335, 13 N. Y. 488.

²⁹ See ch. II, sec. 28, *supra*.

court or court of general equity jurisdiction or other court having power by statute³⁰ can appoint a receiver. The Civil Code of New York³¹ and other³² civil codes based on the New York code did not abolish the essential distinctions between actions at law and suits in equity.³³

When in an attachment suit or other suit at common law a receiver is appointed it must be because a special statute authorizes such an appointment.³⁴

Although court will not grant an order appointing a receiver in a purely legal proceeding, nevertheless courts of equity will grant a final order to stay waste or preserve property either in a proceeding auxiliary to the legal proceeding either in the same court³⁵ or in another court.³⁶ Of course if the legal suit is pending in a court which has no general equity jurisdiction or no power by statute to appoint a receiver, a main cause must be brought in a court having the right to appoint a receiver.

§ 47. Jurisdiction Only over Property the Subject of Litigation. It is always to be remembered that the orders of the court are to be pronounced on that which is alleged in the pleadings between the parties; affidavits and depositions are to be considered only as evidence of the allegations made by the respective parties in proper forms, and can not be attended to as laying a foundation for equities, not otherwise alleged or claimed.³⁷

There can be no valid decree without allegations in the bill (or petition) as a basis for it, as it is quite as essential that

³⁰ See ch. XXXV, Vol. 2, *infra*.

³¹ *Vert v. Collins* (1902), 78 N. Y. Supp. 763; *Reubens v. Joel* (1856), 13 N. Y. 488; see *contra*, *Buller v. Woods* (1853), 10 How. Pr. 222.

³² Ohio Civil Code. See ch. I, par. 10, Civil Code Procedure discussed.

³³ See ch. I, sec. 10, *supra*.

³⁴ See ch. XXXV, Vol. 2, *infra*.

³⁵ *Freer v. Davis*, 52 W. Va. 1, 59 L. R. A. 556, note, 43 S. E. 164; *Cromwell v. Hughes* (1906), 144

Mich. 3, at 5, 107 N. W. 323; *Johnson v. Hall* (1889), 83 Ga. 281, at 282, 9 S. E. 783; *Jerome v. Ross*, 7 Johns. Ch. 315.

³⁶ *Cornelius v. Post*, 9 N. J. Eq. 196; *Tainter v. Mayor*, 19 N. J. Eq. 46; *Ashhurst v. McKensie* (1890), 92 Ala. 484, 9 So. 262; *Wadsworth v. Goree* (1891), 96 Ala. 227, at 231, 10 So. 848.

³⁷ *Dawson v. Yates* (1839), 1 Beav. 301.

there be allegations in the bill (or petition) as it is to have proof to sustain the decree.³⁸

The court acquires jurisdiction over the subject-matter only by the petition and therefore if it appoints a receiver over property not embraced in the petition, it seems its action would be without authority and void.³⁹ It would clearly be improper for the court to appoint a receiver of any property except that embraced in the petition filed in the case on which the receivership is predicated.

Control of the property by the court before a rendition of the judgment is essential to the jurisdiction to render it.⁴⁰

The right and custody of a receiver extends only to the property which is the subject-matter of the litigation.⁴¹ Under a general creditor's bill under the old New York practice before the code giving the remedy of supplemental proceedings the debtor was ordered to assign to the receiver all his property, equitable interests and choses in action to enable the receiver to test the validity of any disposition previously made.⁴² So receivers and trustees in bankruptcy take the whole estate. So did receivers of banks under the old Maine statutes⁴³ and the present United States statute.⁴⁴ So do receivers of corporations generally.

When a litigant by reason of having a mortgage or other security asks for the appointment of a receiver over property covered by such mortgage or other security, the receiver can not take property of the defendant not covered by such mortgage or other lien.⁴⁵ The fact that a plaintiff by reason

³⁸ *Smith v. Brittenham* (1881), 98 Ill. 188, at 200; *Marvin v. Collins* (1881), 98 Ill. 510, at 517; *Miller v. Shaefer* (1898), 75 Ill. App. 389.

³⁹ *Railway Co. v. Whitaker* (1887), 68 Tex. 630, 5 S. W. 448.

⁴⁰ *Benner v. Benner* (1900), 63 O. S. 220, 58 N. E. 569; *Dixon v. Dixon* (1912), 119 Md. 413, at 415, 86 Atl. 1042.

⁴¹ *Noyes v. Rich* (1862), 52 Me. 115, at 116.

⁴² *Chipman v. Sabaton* (1838), 7 Paige 47; cited in *Noyes v. Rich* (1862), 52 Me. 115, at 116.

⁴³ *Noyes v. Rich* (1862), 52 Me. 115, at 116.

⁴⁴ U. S. Compiled Statutes, 1916, sec. 9821; R. S., sec. 5234, as amended May 15, 1916, ch. 121.

⁴⁵ *Wormser v. Merchants Nat. Bk.* (1886), 49 Ark. 117, at 121, 4 S. W. 198; *Thomas v. Armstrong* (1915), 151 Pac. 689, L. R. A. 1916 B 1182; *Staples v. May* (1890), 87 Cal. 178; *Smith v. McCullough* (1881), 104 U. S. 25, at 29, 26 L. ed. 637; *Noyes v. Rich* (1862), 52 Me. 115, at 117.

of a lien on defendant's property may, therefore, be entitled to a receiver of such property held under that lien does not entitle the plaintiff to a receiver of all the defendant's property.⁴⁶ An order appointing a receiver of property in no way involved in the action wherein the receiver is appointed is in excess of jurisdiction and to that extent at least absolutely void.⁴⁷

A receiver after judgment can only take charge of or be directed by the court to take charge of and possession of such property as is described in the judgment.⁴⁸

§ 48. Equity Acts in Personam. "Generally if not universally, equity jurisdiction is exercised in personam, and not in rem, and depends upon the control of the court over the parties, by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree unless otherwise expressly provided by statute is clearly not a judgment in rem establishing a title, but operates in personam only, by restraining the defendant from asserting his claim and directing him to deliver up his deed to be canceled or to execute a release to the plaintiff."

"It would be doubtless within the power of the state in which the land lies to provide by statute that if the defendant is not found within the jurisdiction represented to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose."⁴⁹

"The law which has power over a debtor's person has power to determine how, and on what conditions, a right of his shall be divested, unless the right has relation to tangible property

⁴⁶ *The State v. Union Nat. Bank* (1896), 145 Ind. 537, at 550, 44 N. E. 585.

⁴⁷ *Bowman v. Hazen* (1904), 69 Kan. 682, at 699, 77 Pac. 589.

⁴⁸ *Kreling v. Kreling* (1897), 118 Cal. 421, 50 Pac. 549.

⁴⁹ *Hart v. Sanson* (1883), 110 U. S. 151, at 154, 28 L. ed. 101; *Wilson v. Martin-Wilson*, etc. (1890), 151 Mass. 515, at 517, 24 N. E. 784.

within the jurisdiction of another state which may intervene to control, etc.”⁵⁰

“Proceedings in rem determine the title to the res against all the world. But when a court has jurisdiction of a debtor, and finds he owes the debt, the statute of Massachusetts and other states authorizes the issuing of an execution under which his rights in property, whatever they are, may be sold for the benefit of his creditors. The sale is incidental to the determination of his liability.”⁵¹

As a general rule, when a transfer of property is necessary, the court can not order a conveyance of it by a person other than the owner, except under express or implied authority of a statute.⁵² The appointment of a receiver and the administration of the estate by the court through the receivership is not a proceeding strictly in rem.⁵³

§ 49. Equity Does Not Directly Establish Title. In the ordinary exercise of its jurisdiction, a court of equity acts in personam by compelling a deed to be executed or canceled by or in behalf of the party. It has no inherent power, by the mere force of its decree, to annul a deed or to establish a title.⁵⁴ A court of equity is not the proper forum for the trial of legal titles to land. A court of law is the proper place to resort for such purpose.⁵⁵ After a decree was rendered by a court of equity, obedience to the same was enforced by the court for several centuries by the proceeding of attachment against the bodies of the parties to compel obedience to its orders and decrees. The writ of assistance to deliver possession and even sequestration to compel the performance of a decree are of comparatively recent origin.⁵⁶

⁵⁰ *Wilson v. Martin-Wilson, etc.* (1890), 151 Mass. 515, at 521, 24 N. E. 784.

⁵¹ *Wilson v. Martin-Wilson, etc.* (1890), 151 Mass. 515, at 521, 24 N. E. 784.

⁵² *Wilson v. Martin-Wilson, etc.* (1890), 151 Mass. 515, 24 N. E. 784; see quoted *Wilson v. Welch* (1892), 157 Mass. 77, 31 N. E. 712.

⁵³ *Russel v. Myers Excursion, etc.*

(1907), 67 Atl. 1016, at 1018, 73 N. J. Eq. 192, at 196.

⁵⁴ *Hart v. Sanson* (1884), 110 U. S. 151, at 155, 28 L. ed. 101.

⁵⁵ *Parker v. Shannon* (1885), 114 Ill. 192, at 195, 28 N. E. 1099.

⁵⁶ *Mitchell v. Bunch* (1831), 2 Paige 615; also *Booth v. Clark* (1854), 58 U. S. 321, at 331, 17 How. 322, 15 L. ed. 164.

However, when the court possesses jurisdiction to make a decree, it possesses the power to enforce the execution. When that court adjudges a title to either real or personal property to be in one party to the suit as against another, it enforces its judgment by giving the enjoyment of the right to the party into whose favor it has been decided.⁵⁷

The following proposition is also true: When the defendant in the original action is liable to the plaintiff, either in consequence of contract or as trustee or as the holder of the legal title acquired by any species of mala fides practiced on the plaintiff, the principles of equity give a court jurisdiction to try the case wherever the person may be found and the circumstances that a question of title may be involved in the inquiry and may constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction.⁵⁸

§ 50. When Jurisdiction of the Property Commences. (a) Real Estate. See subject discussed in ch. XX, "Effect of Appointment of Receiver Generally."

(b) Personal Property. See subject discussed in ch. XX, "Effect of Appointment of Receiver Generally."

§ 51. Territorial Limitation of State Court in Appointing Receiver. A court created within a sovereignty is necessarily limited as to its sphere of direct action on persons and things, real estate and chattels within that sovereignty. A court created by a state may have direct authority over persons and things anywhere within the state or not as the sovereignty which created that court wills it.⁵⁹ Most states have district and county and sometimes city courts. The test of their direct jurisdiction over persons and things is dependent upon their power to send their

⁵⁷ Root v. Woolworth (1893), 150 U. S. 413, 37 L. ed. 1123; see *Compton v. Jesup* (1895), 68 Fed. 263, at 279; *Shinney v. Worth Ave. Sav. L. & B. Co.* (1899), 97 Fed. 9, at 11.

⁵⁸ Marshall, C. J., in *Massie v. Watts* (1810), 6 Cranch 148, 3 L. ed. 181.

⁵⁹ See *Covell v. Heyman* (1883), 111 U. S. 176, at 183, 28 L. ed. 390.

officers into the place where the persons and things are located and through their officers act directly on the property, or on the persons by compelling obedience to the orders. Many states allow process to go from one county to another.⁶⁰ State statutes must be consulted.

§ 52. Territorial Limitation of United States Court in Appointing Receivers. Said Story, J., in 1828:⁶¹ “A court created within and for a particular territory is bounded in the exercise of its power by the limits of such territory. It matters not, whether it be a kingdom, a state, a county, or a city, or other local district. If it be the former, it is necessarily bounded and limited by the sovereignty of the government itself, which can not be extraterritorial; if the latter, then the judicial interpretation is, that the sovereign has chosen to assign this special limit, short of his general authority. It was doubtless competent for congress to have authorized original as well as final process to have issued from the circuit court and run into every state of the Union. But it has conferred no such general authority.” We must, therefore, determine the territorial extent of the jurisdiction of the federal courts from the United States statutes⁶² and decisions.

§ 53. Order Appointing Receiver of Realty Has no Extraterritorial Operation. Said Thayer, J., speaking for the Circuit Court of Appeals for the Eighth Circuit:⁶³ “Courts of chancery doubtless have power to compel persons subject to their jurisdiction to execute conveyances of property located in a foreign state which will generally be respected by the courts of the latter sovereignty if they are executed in conformity with their laws. *Phelps v. McDonald*, 99 U. S. 298-308; *Miller v. Sherry*, 2 Wall. 237-249; *Watkins v. Holman*, 16 Pet. 25-57; *Mitchell v. Bunch*, 2 Paige, 606-615. By means of such orders

⁶⁰ Ohio General Code, sec. 2837.

⁶¹ *Piquet v. Swan* (1828), 5 Mason 35, at 40.

⁶² See ch. XXXV, Vol. 2, *infra*;

also see subject “Foreign and Ancillary Receivers,” ch. XVIII, *infra*.

⁶³ *Schindelholz v. Cullum* (1893), 55 Fed. 885, at 889.

and conveyances made thereunder, a court may be able to vest its receiver with the title to realty situated in a foreign jurisdiction which will be there recognized as valid.

But an order appointing a receiver of realty has no extra-territorial operation, and can not affect the title to real property which is located beyond the jurisdiction of the court by which the order was made. *Booth v. Clark*, 17 How. 322-328. Such orders, therefore, only operate in personam and upon those persons who are so related to the court either as parties to the litigation, or by virtue of residence and citizenship, that they are bound to yield obedience to its orders."⁶⁴

§ 54. Order Appointing Receiver of Personalty—What Extraterritorial Effect. Said Lord Langdale in 1835, Master of the Rolls: "It is true that the court has not the means of sending its officers (receivers or other officers) to carry into effect its orders in Ireland, but it has jurisdiction over all the persons in this country and can compel obedience to its orders."⁶⁵ Thus a court in one jurisdiction with the power before it may make an order on that person concerning personalty in another jurisdiction.

§ 55. Statute Making Equity Decrees as to Title Self-Executing. It would doubtless be within the power of the state in which the land lies to provide by statute that if the defendant is not found within the jurisdiction or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose.⁶⁶ Ohio⁶⁷ and other states have passed such a statute. Massachusetts passed such a statute as early as 1851.

⁶⁴ *Schindelholz v. Cullum* (1893), 55 Fed. 885, at 889; see *Baltimore Bldg. & L. Asso. v. Alderson* (1898), 90 Fed. 140, at 146; *Smith v. Berz* (1905), 125 Ill. App. 122, at 130. See ch. XVIII.

⁶⁵ *Langford v. Langford* (1835), 5 L. J. Ch. (N.S.) 60.

⁶⁶ *Hart v. Sanson* (1884), 110 U. S. 151, at 155, 28 L. ed. 101; *Felch v. Hooper* (1875), 119 Mass. 52; *Ager v. Murray* (1881), 105 U. S. 126, at 132, 26 L. ed. 942.

⁶⁷ *Bates R. S.*, 5318, General Code, 11590; Public Stat. of Mass., c. 151, sec. 2, ch. 11; Stat. of 1851, c. 206.

§ 56. Territorial Limitations of Decrees which Operate as Conveyances. Under the Ohio law it is provided that a decree for the conveyance of land shall operate as a conveyance.⁶⁸ But in order that a decree shall thus operate the land itself must be within the jurisdiction of the court. If the land which is the subject-matter in controversy, or of the decree, is within a foreign jurisdiction the decree can not operate as a conveyance. It must be enforced by attachment of the person or otherwise as the case may require.⁶⁹ Without a statute a decree of a court of equity, strictly speaking, does not operate as a conveyance.

§ 57. Quasi Jurisdiction of Equity over Foreign Property. Although the property of a defendant is beyond the reach of the court, so that it can neither be sequestered nor taken in execution, the court does not lose its jurisdiction in relation to that property, provided the person of the defendant is within the jurisdiction. By the ordinary course of proceeding, the defendant may be compelled either to bring the property in dispute or to which the complainant claims an equitable title, within the jurisdiction of the court, or to execute a conveyance or transfer thereof as will be sufficient to vest the legal title, as well as the possession of the property according to the *lex loci rei sitae*.⁷⁰ Such conveyances will generally be respected by the courts of the latter sovereignty, if executed in conformity with their laws.⁷¹

“A court may control, by the receivership, property beyond its territorial jurisdiction, when it has jurisdiction of the par-

⁶⁸ Ohio General Code, sec. 11590 (R. S., sec. 5318).

⁶⁹ Hitchcock, J., in *Daniels v. Stevens* (1850), 19 Ohio 222.

⁷⁰ Walworth, Chan., in *Mitchell v. Bunch* (1831), 2 Paige 615; also quoted in *Booth v. Clark* (1854), 58 U. S. 321, at 331, 15 L. ed. 164.

⁷¹ *Schindelholz v. Cullum* (1893), 55 Fed. 885, at 889; *Baltimore Bldg. & L. Asso. v. Alderson* (1898), 90 Fed. 142, at 146, citing *Phelps v. McDonald*, 99 U. S. 298, at 308, 24 L. ed. 473; *Miller v. Sherry*, 2 Wall. 237, at 249, 17 L. ed. 827; *Watkins v. Holman's Lessee*, 16 Pet. 25, at 57, 10 L. ed. 873; *Mitchell v. Bunch*, 2 Paige 606, at 615.

ties, and it may restrain them from interfering with the receiver's possession of such property.''⁷²

§ 58. Decrees in One State Binding on Courts in Another State. The Constitution of the United States provides that "Full faith and credit shall be given in each state to the * * * judicial proceedings of every other state; and that congress may by general laws prescribe the manner in which such * * * proceedings shall be proved and the effect thereof.''⁷³

Neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, nor the acts of congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered.⁷⁴

The judgment of a court of one state to be binding in a court in another must be final because an interlocutory decree or order which may not be appealed from until after final judgment is a mere step in the proceedings, ultimately to ripen into a judgment which may be reviewed.⁷⁵

If the force and effect of the order appointing a receiver is merely interlocutory and is not conclusive between the parties and not final,⁷⁶ then the courts of a foreign state are not compelled to give full credit to such an order.⁷⁷

⁷² *Stewart v. Laberee* (1911), 185 Fed. 471, citing 34 Cyc. 214; *Chesapeake & Ohio Ry. v. Swayze*, 60 N. J. Eq. 417, 47 Atl. 28; *Vermont & C. R. R. Co. v. Railway*, 46 Vt. 792; *Sercomb v. Catlin*, 128 Ill. 556, 21 N. E. 606; *Chafee v. Inidnick*, 13 R. S. 442; *Schwindelholz v. Cullum*, 55 Fed. 885; see *State v. Railway* (1875), 15 Fla. 201, at 284.

⁷³ United States Constitution, art. IV, sec. 1; United States Rev. Stat., p. 120, sec. 905; *Thompson v. Whitman* (1873), 18 Wall. 457, 21 L. ed. 897; *Revere Copper Co. v. Dimock* (1882), 90 N. Y. 33; *Cole v. Cun-*

ningham, 133 U. S. 107, 33 L. ed. 538.

⁷⁴ *Thompson v. Whitman* (1873), 18 Wall. 457, 21 L. ed. 897; *Simmons v. Saul* (1890), 138 U. S. 437, at 448, 34 L. ed. 1054; *Smith v. Central Trust Co.* (1897), 154 N. Y. 333, 48 N. E. 553.

⁷⁵ *New York & N. J. Tel. Co. v. Metropolitan Tel. Co.* (1894), 81 Hun, 409.

⁷⁶ *New York & N. J. Tel. Co. v. Metropolitan Tel. Co.* (1894), 81 Hun, 409.

⁷⁷ See question discussed under ch. XVIII, Foreign and Ancillary Receivers.

Certain provisions of the New York Civil Code of Procedure⁷⁸ give the right of appeal from orders affecting a substantial right where a full hearing has been had.⁷⁹ An order appointing a receiver might be construed as affecting a substantial right and appealable under such a statute. Such an order might require full faith and credit to be given to it in another state.

A receiver of a corporation was appointed by the Common Pleas Court of Hamilton county, Ohio, a creditor of the corporation living within the jurisdiction of the Hamilton county court caused suit to be instituted in the states of Kentucky and Illinois and garnished debts of the corporation in those states. The Hamilton county court held that, "The court of Hamilton county appointing the receiver has power to order such creditor to dismiss such garnishee proceedings, and on his failure to comply with the order, to punish as for contempt."⁸⁰

§ 59. Enforcement of Decrees Operative Outside of State.

It was early held in 1750 in the famous case *Penn v. Lord Baltimore*,⁸¹ that, "There are several cases wherein collaterally and by reason of the contract of the parties, matters out of the jurisdiction of the court originally will be brought within it. Thus the court of chancery of England decreed the specific performance of articles executed in England concerning boundaries of two provinces in America. The court could not extend its arm across the water and enforce its decree in America, but could make an order in personam against a party before the court in England and bind his conscience and make him perform an act which he agreed to do concerning boundaries across the water.

"It is here (United States) undoubtedly a recognizing doctrine that a court of equity sitting in one state and having jurisdiction of the person may decree a conveyance by him of

⁷⁸ New York Civil Code of Procedure, sec. 349, sec. 11, div. 3.

⁷⁹ *Riggs, et al. v. Pursell, et al.* (1878), 74 N. Y. 378.

⁸⁰ *Besuden v. Besuden Co.* (1896).

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(Cincinnati, O., Superior Courts; see *Enos v. Gilmore* (1847), 4 Gilm. (Ill.) 212; *Johnson v. Gibson* (1886), 116 Ill. 294, 6 N. E. 205.

⁸¹ *Vesey Senior*, 444 (1750).

land in another state and may enforce the decree by process against the defendant. True, it can not send its process into that other state, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title.⁸²

Its writ may not be operative there, nor its judgment capable of execution as against that portion of the property outside of the state, and for that reason the court might require a mortgagor to execute a conveyance to the purchaser on foreclosure in order that the whole security offered by the mortgage should so far as possible be effective.⁸³ It must therefore follow, if the court's jurisdiction over property itself when the person is not before the court, is limited by the territorial extent of the jurisdiction of that court, and when the court takes custody of the property it can only take custody of property within the jurisdiction of the court.⁸⁴

Says Story, Judge, in 1828:⁸⁵ "The courts of a state, however general may be their jurisdiction, are necessarily confined to the territorial limits of the state. Their process can not be executed beyond those limits; and any attempt to act upon persons or things beyond them would be deemed usurpation of foreign sovereignty, not justified or acknowledged by the law of nations."

§ 60. Jurisdiction of Receivers within State. "All things within the territorial boundaries of a sovereignty are within its jurisdiction and generally within its own boundaries a sovereignty is supreme."⁸⁶ A state is supreme within its boundaries, except so far as its power and authority are limited by the Constitution and laws of the United States; and within the Con-

⁸² *Miller v. Dows* (1876), 94 U. S. 444, 24 L. ed. 76.

⁸³ *Union Trust Co. v. Olmstead* (1886), 102 N. Y. 729, 7 N. E. 822.

⁸⁴ *Piquet v. Swan* (1828), 5 Mason 35, at 40, cited in *State of Florida v. Railway* (1875), 15 Fla. 201, at 284.

⁸⁵ *Piquet v. Swan* (1828), 5 Mason 35, at 40; see *State v. Railway* (1875), 15 Fla. 201, at 284.

⁸⁶ *Arndt v. Griggs* (1889), 134 U. S. 316, 33 L. ed. 918.

stitution and laws of the United States, the courts of that state may have all the jurisdiction over all persons and things within the state, which the constitution and laws of that state may give to them; and the mode of obtaining this jurisdiction may be prescribed wholly, entirely and exclusively by the statutes of that state.⁸⁷ Jurisdiction is acquired in one or two modes:

First. As against the person of the defendant by service of process.

Second. By a procedure against the property of the defendant within the jurisdiction of the court.

Said the Supreme Court of Arkansas:⁸⁸ "No writ or process, according to the common law, can run or be executed beyond the limits of the territorial jurisdiction of the court out of which it issues;⁸⁹ and it is clear that the court of one county can not run its writs or process within the boundaries or limits of another county without some legislation on the subject." Many states provide by statute what writs may issue out of one county into another county.⁹⁰

Where a receiver or administrator or other custodian of an estate is appointed by the court of the state, the courts of that state reserve to themselves full and exclusive jurisdiction over the assets of the estate within the limits of the state.⁹¹

A receiver's power and authority are only by reason of his appointment by the court, an arm of the sovereignty of the state, therefore he has no powers, as receiver, outside the state,⁹² except by the will of the sovereignty outside the state. But the receiver's powers being given to him by an arm of the state, he must be recognized anywhere within the state when showing

⁸⁷ *Arndt v. Griggs* (1889), 134 U. S. 316, 33 L. ed. 918.

⁸⁸ *The Auditor v. Davis* (1841), 2 Ark. 503, cited in *State v. Railway* (1875), 15 Fla. 201, at 285.

⁸⁹ *Covell v. Heyman* (1883), 111 U. S. 176, at 183, 28 L. ed. 390, citing *Ableman v. Booth*, 21 How. 506, at 516, 15 L. ed. 465.

⁹⁰ Ohio General Code, sec. 11284 (R. S. 5037).

⁹¹ *Bartlett v. Wilbur*, 53 Md. 485; *Reynolds v. Stockton* (1890), 140 U. S. 254, 35 L. ed. 464; *Lessee of Avery v. Pugh* (1939), 9 Ohio 67, at 69; *John Brown v. Carolina Central* (1880), 83 N. C. 128; *Atlantic Nat. Bank v. Peregoy-Jenkins Co.* (1908), 147 N. C. 293, 61 S. E. 68.

⁹² *Ableman v. Booth* (1858), 18 How. 506, 15 L. ed. 465.

proper credentials. It is said that the court of common pleas sitting in one county is a court of limited local jurisdiction and can not take cognizance of matters without or beyond that local jurisdiction. This, to a certain extent, and as a general rule, is correct. It must exercise its jurisdiction within the appropriate county, but when that jurisdiction has been exercised, the effects are not always limited to the county,⁹³ or even to the state. A judgment recovered in one county, if the court had jurisdiction, is conclusive proof of the right of the parties, not only in that particular county, but throughout the state and throughout the United States, and perhaps throughout the world.⁹⁴

Said the Supreme Court of Pennsylvania: "A court of general equity jurisdiction in one county in a state may appoint a receiver of the assets of a corporation wherever situated in the state. The court which first appoints a receiver has the sole disposition of the fund or property over which he was appointed; he can not in any way be interfered with by a receiver subsequently appointed."⁹⁵

A federal circuit court, for the purpose of collecting in choses in action, might direct its receiver to institute independent suits in such circuit court or in courts of the state in which such circuit court is located,⁹⁶ but a suit by the receiver under the direction of the court is not dependent upon the citizenship⁹⁷ of the parties or the amount in controversy.⁹⁸

When a court of equity attempts to act directly upon property, whether real or personal, by its decree, it is in the absence

⁹³ *Price v. Bankers Trust Co.* (1915) unofficial, 178 S. W. 745.

⁹⁴ *Lessee of Avery v. Pugh* (1830), 9 Ohio 67, at 68.

⁹⁵ *Tenth Nat. Bank v. Construction Co.* (1910), 227 Pa. 354, 76 Atl. 67; see *Sullivan v. Algrem*, 160 Fed. 366.

⁹⁶ *Peck v. Elliott* (1897), 79 Fed. 10.

⁹⁷ *Hampden Rds., etc., v. Newport, etc.* (1904), 131 Fed. 534, at 536; *Davis v. Gray*, 16 Wall. 218, 219,

21 L. ed. 447; *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145; *Pacific Ry. v. Missouri P. Ry.*, 111 U. S. 505, 28 L. ed. 498; *In re Tyler*, 149 U. S. 181, 37 L. ed. 689; *Root v. Woolworth*, 150 U. S. 413, 37 L. ed. 1123; *Carpenter v. Northern Pac.*, 25 Fed. 851.

⁹⁸ *Bowman v. Harris* (1899), 95 Fed. 917, at 918; *White v. Ewing*, 159 U. S. 38, 40 L. ed. 67.

of statutory regulation essential to the power of the court to act that the property to be affected be within the territorial jurisdiction of the court.⁹⁹ State statutes often permit court process to go throughout the state.

There are statutes in some states¹ making a final decree of a court effective as notice in the county where rendered, when rendered, and effective as notice in other counties when properly recorded in that county.² Other statutes make a judgment for a conveyance, release or acquittance operative as if the conveyance, release or acquittance had been executed conformably to the judgment. A decree appointing a receiver is not a final decree, but an interlocutory decree, and therefore would not well come under such statute. If there is no statute, therefore, it is hard to see how the appointment of a receiver in one county acts directly upon lands of the defendant in another county.³

A court of equity, for instance, has no more power to lay hold of a trust fund in another jurisdiction and administer it through the instrumentality of a receiver or trustee, than it has to entertain a bill for the partition of land lying in a foreign jurisdiction, which all concede can not be done.⁴ A judgment in rem binds only the property within the control of the court which rendered it; and a judgment in personam finds only the parties to that judgment and those in privity with them.⁵

Nor can a court of equity make any order or decree that will, by its own inherent force, divest one person and clothe another with the title to land in another county, except in cases expressly provided for by statute. Yet, while this is so, it is equally well settled that when one is the owner of land or other property in a foreign jurisdiction, which in equity and good conscience he ought to convey to another, the latter may sue him in equity

⁹⁹ *Piquet v. Swan* (1828), 5 Mason 35, at 40, *Johnson v. Gibson* (1886), 116 Ill. 294, 6 N. E. 205; *Tenth Nat. Bk. v. Construction Co.* (1910), 227 Pa. 354, at 362, 76 Atl. 67.

¹ Ohio General Code, sec. 11301.

² Ohio General Code, sec. 11590.

³ *Piquet v. Swan* (1828), 5 Mason 35, at 40; *State v. Railway* (1875), 15 Fla. 201, at 284.

⁴ *Johnson v. Gibson* (1886), 116 Ill. 294, at 301, 6 N. E. 205.

⁵ *Johnson v. Powers* (1890), 139 U. S. 156, at 159, 35 L. ed. 112.

in any jurisdiction in which he may be found and compel him to convey the property. The decree in such cases directing a conveyance of the property does not directly affect the title of the property, yet the enforcement of it does result in a complete change of the title.⁶ The court having jurisdiction of the defendant in a receivership case may order him to make a conveyance to the receiver of property within the state and outside of the county wherein he is appointed. See ch. XXVIII, *infra*.

§ 61. Appointment of Receiver over Nonresident's Property. Under the general power to appoint receivers, given by the English Judicature Act of 1873, sec. 25, subsec. 8, and having regard to Rules of Supreme Court, 1883, XIII, r. 24 and 28, the court has jurisdiction to enforce a judgment for payment of money into court by a defaulting trustee by the appointment of a receiver of his equitable interest in property in this country and order accordingly where from the debtor being out of the jurisdiction service of a writ of attachment could not be affected.⁷

The states by proper statute authorize actions against non-residents and service of summons therein by publication only or service in some other form, no better; and in the nature of things such must be done in every jurisdiction, in order that full and complete justice may be done where some of the parties are nonresidents.⁸

Of course when a nonresident is sued and no personal service is had upon him, only his property within the jurisdiction of the state can be seized to respond to the court's order,⁹ and no personal judgment can be had against such party.

Brewer, J., in *Arndt v. Griggs*,¹⁰ when discussing the power of a court of equity to act against property when the owner

⁶ *Johnson v. Gibson* (1886), 116 Ill. 294, at 301, 6 N. E. 205.

⁷ *Correy v. Bennett* (1885), 39 Ch. D. 993.

⁸ *Arndt v. Griggs* (1889), 134 U. S. 316, 33 L. ed. 918.

⁹ *Arndt v. Griggs* (1889), 134 U. S. 316, 33 L. ed. 918.

¹⁰ *Arndt v. Griggs* (1889), 134 U. S. 316, 33 L. ed. 918.

was a nonresident and not served, said when discussing the matter under Nebraska statutes: "The question is not what a court of equity, by virtue of its general powers and in the absence of a statute might do, but it is, What jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts to determine the validity and extent of the claims of nonresidents to such real estate?"

If a state has no power to bring a nonresident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within the limits held by its own citizens; and a cloud cast upon such title by a claim of a nonresident will remain for all time a cloud, unless such nonresident shall voluntarily come into the courts for the purpose of having it adjudicated. But no such imperfection attends the sovereignty of the state. It has control over property within its limits, and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to the rules concerning the holding, transfer, liability to obligations, private and public, and modes of establishing titles thereto.

After the doctrine has been established, that a court of equity can enter a final decree against property of a nonresident, it must be that such a court can take to itself the custody of the property to abide by the final determination of the cause.

It is said by Putnam, J., that the courts of any jurisdiction may in a proper case take possession through receivers of property within their limits independently of the question of the domicile of the owner.¹¹ Since the owner is absent such a proceeding must be in the nature of a proceeding in rem. This being so, only that property under direct jurisdiction of the state court and its own officers could be taken in such a receivership proceeding.

§ 62. Concurrent Jurisdiction of Courts in General. "The principle that, where property is in the actual possession of

¹¹ *Hutchinson v. Am. P. C. Co.* (1880), 104 Fed. 182.

one court of competent jurisdiction, such possession can not be interfered with by process out of another court, is well settled."¹²

"A departure from this rule would lead to the utmost confusion, and to endless strife between courts of concurrent jurisdiction deriving their power from the same source; but how much more disastrous would be the consequences of such a course in the conflict of jurisdiction between courts when powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and the subject-matters of the suit."¹³

There are two classes of cases in which the court first obtaining jurisdiction should be suffered to proceed without any interference by process from another of concurrent jurisdiction.¹⁴

First class. Which the exercise of jurisdiction by one court will interfere with the prior possession of the res by another court of competent and concurrent jurisdiction.

Second class. When there are two suits pending in different courts of concurrent jurisdiction in which the parties are the same and which involve and affect the same subject-matter, and where the jurisdiction of neither is complete nor effectual unless it may if necessary or proper, exercise exclusive dominion of the res in litigation.¹⁵

When by the issuance and levy of process, or the filing of a bill in equity, property either real or personal is brought

¹² Powers v. Blue Grass, etc. (1898), 86 Fed. 705, at 707; Buck v. Colbath (1865), 3 Wall. 334, at 341, 18 L. ed. 257; Krippendorf v. Hyde (1883), 110 U. S. 276, at 283, 28 L. ed. 145; Byers v. McAuley (1892), 149 U. S. 608, 37 L. ed. 867; State, ex rel. Sullivan, v. Reynolds (1908), 209 Mo. 161, 107 S. W. 487.

¹³ Buck v. Colbath (1865), 3 Wall. 334, at 381, 18 L. ed. 257; Byers v. McAuley (1892), 149 U. S. 608, at 614, 37 L. ed. 867.

¹⁴ Powers v. Blue Grass, etc. (1898), 86 Fed. 705, at 708; Krippendorf v. Hyde (1883), 110 U. S. 276, 28 L. ed. 145; Herdrither v. Oil Cloth Co. (1884), 112 U. S. 294, 28 L. ed. 729; Byers v. McAuley (1892), 149 U. S. 608, 37 L. ed. 867.

¹⁵ Powers v. Blue Grass, etc. (1898), 86 Fed. 705, at 708; Gates v. Bucki (1893), 53 Fed. 961; Merritt v. Barge Co. (1897), 79 Fed. 228; Zimmerman v. So Relle (1897), 80 Fed. 417; Shannon v. Terry (1888), 36 Fed. 337.

in custodia legis, the control and jurisdiction over the same is exclusively with the court which thus acquires legal possession thereof. To sustain the jurisdiction created by the seizure of the property, the possession and right of control must be continued not only until final judgment is pronounced, but in some cases, until that judgment is satisfied.¹⁶

The mere fact of the pendency of two suits in personam between the same parties and upon the same identical cause of action in courts of different jurisdiction does not make a case in which the jurisdiction of one is impeded or interfered with by the action of the other.¹⁷

Repeated attempts to maintain the negative of this proposition have been made and it must be admitted that such attempts have been successful in a few jurisdictions but the great weight of authority is the other way.¹⁸

The petition by an assignee for the benefit of creditors to the court wherein the assignment is lodged and filed for direction from the court in the conduct of his trust and for settlement of his accounts does not change the character of the possession of the assignee. He remains in possession of the res after he filed the petition as assignee under the deed of assignment and not under any appointment by or authority from the court wherein the deed of assignment was lodged and filed. The court did not take possession of any part of the assets. The pendency of the petition in that court did not place the property in gremio legis and was no obstacle to the prosecution in a court of the United States of a suit to annul the deed of assignment as invalid and recover the assets from the assignee.¹⁹

§ 63. Concurrent Jurisdiction of United States and State Courts. There can be no such thing as judicial authority,

¹⁶ Gates v. Bucki (1893), 53 Fed. 961, at 965.

¹⁷ Powers v. Blue Grass, etc. (1898), 86 Fed. 705, at 708.

¹⁸ Stanton v. Embrey (1876), 93

U. S. 548, at 554, 23 L. ed. 983, and see numerous cases there cited.

¹⁹ Powers v. Blue Grass, etc. (1898), 86 Fed. 705, at 709; Williamson v. Superior Cement Co. (1915), 229 Fed. 59.

unless it is conferred by a government or sovereignty, and the judges and courts acting in a state must derive their jurisdiction from the United States or the state. Although a state is sovereign within its territorial limits, yet to a certain extent, that sovereignty is limited and restricted by the constitution of the United States. And the powers of the general government and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties acting separately and independently of each other within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by land-marks and monuments visible to the eye.²⁰

Said Mr. Justice Matthews of the Supreme Court:

“The forbearance which courts of co-ordinate jurisdiction administered under a single system, exercise toward each other whereby conflicts are avoided, by avoiding interference with the process of each other is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is something more. It is a principle of right and of law and therefore a necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system so far as their jurisdiction is concurrent, and although they coexist in the same space, they are independent and have no common superior. They exercise jurisdiction, it is true within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty.”²¹

The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto and for the time being dis

²⁰ *Ableman v. Booth* (1858), 21 How. 506, Taney, J., 15 L. ed. 465; see *Welch v. Union Casualty Co.* (1917), 238 Fed. 968, at 977.

²¹ *Covell v. Heyman* (1885), 114 U. S. 176, 28 L. ed. 390.

ables other courts of co-ordinate jurisdiction from receiving a like power.²² This rule is essential to the orderly administration of justice and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons.²³

In *Peale v. Phipps*,²⁴ an attempt was made in one of the federal circuit courts to exercise jurisdiction over a trustee who had been duly appointed by the Circuit Court of Adams county, Mississippi, and in reversing the judgment of the circuit court which entertained jurisdiction, the Supreme Court of the United States said: "The property in legal contemplation was in the custody of the court of which he was the officer and had been placed there by the laws of Mississippi, and while it is thus retained in the custody and possession of that court, awaiting the order and decision, no other court had a right to interfere with it or to wrest it from the hands of its agent and thereby put it out of his power to perform his duty." The office of trustee used in this case has most of the attributes of a receiver.

Any person not a party to a suit or judgment, whose property has been wrongfully, but under color of process taken and withheld, may prosecute his ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds while remaining in the control of that court, but that all other remedies to which he may be entitled against officers or parties not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal state or federal, having jurisdiction over the parties and the subject-matter. And vice versa the same principle protects the possession of the property while thus held, by process issuing from state courts, against any disturbance under process of

²² *Odell v. H. Batterman Co.* (1915), 223 Fed. 292, at 297, citing *Murphy v. John Hoffman Co.* (1908), 211 U. S. 562, at 569, 53 L. ed. 327; *Young v. Hamilton* (1910), 135 Ga. 339, at 346, 69 S. E. 593.

²³ *Farmers Loan Co. v. Lake St. Ry.* (1889), 177 U. S. 51, 44 L. ed. 66/.

²⁴ *Peale v. Phipps* (1852), 14 How. 368, 12 L. ed. 1070.

the courts of the United States, excepting, of course, those cases wherein the latter exercise for the purpose of enforcing the supremacy of the Constitution and laws of the United States.²⁵

A court of bankruptcy may for instance under the Constitution of the United States and the laws passed in pursuance thereof be entitled to the possession of property which is in the possession of the state court through its receiver. In such a case the state court will not decline to yield possession of the property to the bankrupt court. In such cases the United States Bankruptcy Court through its receiver or other officer applying for the possession of the property does not undertake to contest the jurisdiction of the state court because the receiver of the state court was improvidently granted, or that the allegations upon which the court acted were not true in point of fact, but because the extreme fact of bankruptcy, which gives the United States courts exclusive jurisdiction of the property of the bankrupt, after adjudication in proper cases.²⁶

However, "they (the state and United States courts in cases where the United States Constitution does not give exclusive jurisdiction to one or another as for instance to the United States courts in bankruptcy proceedings) exercise jurisdiction it is true, within the same territory but not in the same place; and when one takes into its possession a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty." When, therefore, a petition in the state court discloses jurisdiction of the res through its receiver therein appointed, and the allegations presented a case entitling the plaintiff to the relief sought, a receiver in a subsequent suit instituted in the Circuit Court of the United States can not proceed by a collateral motion based on a

²⁵ *Freeman v. Howe* (1860), 24 How. 450, 16 L. ed. 749; *Byers v. McAuley* (1892), 149 U. S. 608, at 614, 37 L. ed. 867; *Young v. Ham-*

ilton (1910), 135 Ga. 339, at 349, 69 S. E. 593.

²⁶ *Young v. Hamilton* (1910), 135 Ga. 339, at 350, 69 S. E. 593.

traverse of the allegation in the state court petition and ask for a summary vacation of the appointment of the state court receiver and a surrender of the possession of the property to the United States Circuit Court receiver.²⁷

§ 64. Concurrent Jurisdiction of State Courts. The lawful custody of specific property by a court of competent jurisdiction withdraws that property so far as necessary to accomplish the purpose of that custody and until that purpose is accomplished from the jurisdiction of every other court.

The court which first acquires the lawful jurisdiction of specific property by the seizure thereof, or by due commencement of a suit from which it appears that it is, or will become necessary to a determination of the controversy involved, or to the enforcement of its judgment or decree therein for the court to seize, to charge with a lien, to sell, or to exercise other like dominion over it, thereby withdraws that property from the jurisdiction of every other court so far as necessary to accomplish the purpose of the suit and entitles that court to retain the control of its requisite to effectuate its final judgment or decree therein free from the interference of every other tribunal.²⁸

“When a court of competent authority takes jurisdiction, that fact excludes the jurisdiction of all other courts over the case, and all its incidents, excepting courts as have appellate and supervisory control, there being nothing left to which the jurisdiction of another court can attach.” This ruling was applied to a case where a receiver was appointed by the circuit court of St. Louis county, a court of competent jurisdiction, by the same court the receiver was removed and another appointed in his stead. From an order refusing to vacate the second appointment an appeal was granted and the assets turned over to the corporation on the giving of a bond. During pendency of this appeal the circuit court of the city

²⁷ Young v. Hamilton (1910), 135 Ga. 339, at 350, 69 S. E. 593.

²⁸ Sullivan v. Algrem (1908), 160 Fed. 366; Welch v. Union Casualty Co. (1917), 238 Fed. 940.

of St. Louis, another court having concurrent jurisdiction with the county courts, took jurisdiction of an action by creditors of the corporation and a receiver was appointed to administer the assets. Held that since the assets were by the first action in custodia legis and that court still retained jurisdiction of the case the circuit court of the city of St. Louis had no jurisdiction in the case.²⁹

Authorities need not be multiplied in support of the rule that a court has no power to appoint a receiver when one has already been appointed by another court of equal jurisdiction. This rule is essential to the orderly administration of justice, for without it there would be unseemly conflicts between courts undertaking to exercise jurisdiction over the same subjects and powers. It was said commenting on the concurrent jurisdiction of York county and Philadelphia county (Penn.) common pleas courts over a receiver for property in Pennsylvania: "If the York county court could interfere with the administration by the court below through its officers, of the estate of the construction company, so might the courts of the counties of Chester and Mefflin and of as many other counties as might happen to have assets of the company within their borders. Instead of one account by a receiver, to be passed upon by one court, there would be an account in each county by the receiver appointed by the court and in every question raised on the accounts of receivers so appointed there might be as many minds as there were judges who made the appointments. To avoid such confusion if for no other reason when an appointment is once made by a court of competent jurisdiction, that appointment ought not to be interfered with by any other court within the same state. The controlling reason of the rule that the court which first appoints a receiver has exclusive jurisdiction over him and the assets to be sequestered and administered, is that by his appointment those

²⁹ State, ex rel., *Sullivan v. Rey.* 161; see also *Tenth Nat. Bank v. nolds* (1907), 107 S. W. 487, 209 Mo. Const. Co. (1910), 227 Pa. St. 354, 76 Atl. 74.

assets pass at once in gremio legis and are not therefore to be interfered with by the process of any other court.³⁰

§ 65. Jurisdiction to Modify Order of Appointment. The appointment of a receiver is a remedy granted by a court of equity or a court having statutory powers to appoint a receiver. With few exceptions the appointment of a receiver is an interlocutory order and determines no right and is not a final order. When the appointment of a receiver is an interlocutory order it may be modified by the court like any other interlocutory order.³¹ When such an order may be reviewed as authorized by statute or may be reviewed because it affects a substantial right, then the court's power to modify the order must be governed by the status of the order under the statute or by reason of its affecting a substantial right and thereby being in effect a final order.

§ 66. Jurisdiction to Remove Receiver. The power to appoint includes the power to remove.³²

Where there are two or more receivers and they become hostile, a court can and should intervene to remove them and appoint others.³³

§ 67. Jurisdiction to Appoint Successor to Receiver. If an original appointment of a receiver is valid and the property of the defendant is under the control of the court, the court on its own motion without notice has authority to accept the resignation of the acting receiver and to appoint a successor.³⁴

³⁰ Tenth Nat. Bk. v. Const. Co. (1910), 227 Pa. St. 354, at 361, 76 Atl. 74.

³¹ Booth v. Clark, 17 How. 322, 15 L. ed. 164; Baltimore Bldg., etc., v. Alderson (1900), 99 Fed. 489-494; Schmidt v. Johnson (1912), 161 Ill. App. 623, at 626.

³² Flinn v. Hanbury (1913), 157 N. Y. App. Div. Rep. 207, 141 N. Y. S. 844.

³³ People v. Brooklyn Bank (1908), 125 N. Y. App. Div. Rep. 354, 109 N. Y. S. 534; Shirk v. Brookfield (1902), 77 N. Y. App. Div. Rep. 295, 79 N. Y. S. 225.

³⁴ Nichol v. Murphy, 145 Mich. 424, 108 N. W. 704; In re Estate of Graff (1910), 86 Neb. 535, at 539, 125 N. W. 1091; Very v. Watkins, 23 How. 469, 16 L. ed. 522; Shields v. Coleman, 157 U. S. 178, at 179, 39 L. ed. 660.

Where an order has been made discharging an active receiver and releasing him from further liability shows that there is money upon hand which such receiver is directed to pay over subject to the order of court, and it does not appear that this money had been fully and finally disbursed by the court, the jurisdiction of the court over such money has not been terminated.

In such a case the court may upon an ex parte application without notice appoint a successor to such acting receiver.⁸⁵

§ 68. Jurisdiction of Court Continues though Personnel of Receiver Changes. So long as property remains in the custody of the court, and is administered through the agency of a receiver, such receivership is continuous and uninterrupted until the court relinquishes its hold on the property, though its personnel may be subject to change.⁸⁶

§ 69. Exclusive Jurisdiction of Appointing Court. Said Mr. Justice Moody of the United States Supreme Court:⁸⁷ "When a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts." The latter courts (state court in that instance), though of concurrent jurisdiction, are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court which has seized it. For the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to

⁸⁵ Taylor v. Easton (1910), 180 Fed. 363, at 367.

⁸⁶ Baltimore Bldg. & L. A. v. Alderson (1900), 99 Fed. 489-494; McNulta v. Lochridge (1891), 141 U. S. 327, at 331, 35 L. ed. 796; State, ex rel., v. Reynolds (1907),

209 Mo. 161, at 174, 107 S. W. 487; Very v. Watkins, 23 How. 469, 16 L. ed. 522; Shields v. Coleman, 157 U. S. 178, at 179, 39 L. ed. 660.

⁸⁷ Wabash R. R. v. Adelbert College (1907), 208 U. S. 38, at 54, 52 L. ed. 642.

hear and determine all questions respecting the title, the possession or the control of the property. In the courts of the United States, this incidental and ancillary jurisdiction exists although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy.”

Said the Supreme Court of the United States:³⁸ “The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States, this ancillary jurisdiction may be exercised though it is not authorized by any statute. This jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them.”

§ 70. Effect of Want of Jurisdiction. Courts may not seize property without jurisdiction and then claim jurisdiction over the property because it is in the possession of the court.³⁹ Nevertheless, although an order appointing a receiver may be without judicial authority in whole or in part and is *coram non judice* and void, the jurisdiction of the court over the subject-matter may be in no way affected nor the judicial possession of the property.⁴⁰ If the court does seize property without jurisdiction the court holds such property for the protection of those whose rights in such property should appear.⁴¹ Whether or not the court had the right originally to appoint the receiver, the receiver can not dispute the right of the court to appoint him and his sureties are estopped to dispute the court's right.⁴² It is the court's duty to restore

³⁸ *Murphy v. John Hofman Co.*, 211 U. S. 562, at 569, 53 L. ed. 327; see also *Odell v. Batterman* (1915), 223 Fed. 292, at 297; see *The State, ex rel. Flannelly*, (1915), 96 Kan. 372, 152 Pac. 22.

³⁹ *Hawes v. First Nat. Bk.* (1915), 229 Fed. 51, at 59.

⁴⁰ *Langdon v. Vermont, etc., Ry.* (1882), 54 Vt. 656.

⁴¹ *Baltimore Bldg., etc., v. Alderson* (1900), 99 Fed. 489-494.

⁴² *Baltimore Bldg., etc., v. Alderson* (1900), 99 Fed. 489-494; *Beardsley Co. v. V. E. Ashdown & Co.* (1913), 73 W. Va. 132, 80 S. E. 128.

the fund to the true owner as soon as possible and in an orderly proceeding.⁴³

§ 71. Consent Can Not Confer Jurisdiction to Appoint Receiver. Where the court has no jurisdiction to appoint a receiver such authority can not be conferred by consent or stipulation of the parties.⁴⁴ The reason of this usage or rule of equity is that no litigant has an absolute right to the appointment of a receiver. The appointment of a receiver is a remedy granted by the court at its discretion.

§ 72. Property Which May Be Taken by Receiver. Said Mr. Justice Swayne in the famous case of *Davis v. Gray*:⁴⁵ "A receiver is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such a nature, that if legal, it might be taken in execution, may if equitable be put into his possession."

§ 73. Jurisdiction of Court Appointing Receiver in Collecting Assets. A petition by a receiver asking the appointing court for authority to bring suit to collect in assets belonging to the estate is auxiliary to the main suit. The jurisdiction of the court to entertain such a petition depends upon the court's jurisdiction in the original case.⁴⁶ The complete jurisdiction of the court over the res, the property and the assets over which the receiver is appointed, involves the court's right to bring before

⁴³ *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 35 L. ed. 151.

⁴⁴ *Smith v. Superior Court* (1893), 97 Cal. 348, at 351, 32 Pac. 322; *Freer v. Davis* (1903), 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, at 562; *Baker v. Varney*, 129 Cal. 564, 62 Pac. 100; see *Scott v. Hotchkiss* (1896), 115 Cal. 89, 47 Pac. 45; *First Nat. Bk. v. Superior Ct.* (1909), 12 Cal. App. 335, 107 Pac. 322; see L. R. A. 1074, 29 App. D. C. 209; see 63 L. R. A. 798.

⁴⁵ *Davis v. Gray* (1872), 16 Wall. 203, at 217, 21 L. ed. 447.

⁴⁶ *White v. Ewing* (1894), 159 U. S. 36, at 39, 40 L. ed. 67; *Freeman v. Howe*, 24 How. 450, at 460, 16 L. ed. 749; *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145; *Dewey v. West Fairmount Gas Coal Co.*, 123 U. S. 329, 31 L. ed. 179; *In re Tyler*, 149 U. S. 164, 181, 37 L. ed. 689; *Root v. Woolworth*, 150 U. S. 401, 413, 37 L. ed. 1123; *Rouse v. Letcher*, 156 U. S. 47, 49, 39 L. ed. 341; *Hampden Rds. v. Newport* (1904), 131 Fed. 534.

it persons having possession of any of those assets or having claims thereon or who were indebted to it, and either itself hear and determine all controversies or refer them to a master or to a jury as the court sees fit.⁴⁷

A party to the court proceeding properly before the court who interferes with the funds which a receiver is directed to collect though outside the jurisdiction of the court, is guilty of contempt.⁴⁸ The same doctrine is applied to jewelry, watches and silverware.⁴⁹

Nevertheless, a foreign receiver to whom no voluntary conveyance has been made can not as a matter of right obtain the assistance of the courts of a foreign jurisdiction to secure possession of chattels.⁵⁰ Yet such foreign receiver by comity may have the power if recognized by the foreign state.⁵¹ There is a distinction between the right and the power.⁵²

§ 74. Courts without Statute Have No Jurisdiction after Dissolution of Corporation. See subject-matter discussed in ch. XIV, "Receivers of Corporations and Public Utilities," sec. 222.

§ 75. Collateral Attack on Appointment of Receiver. When the power and jurisdiction of a court to appoint a receiver is conceded or exists beyond question, and the court in the exercise of its jurisdiction has entered judgment appointing a receiver, such judgment of the court is not open to collateral attack,⁵³ and even if the order was made improvidently it is not so open to attack in a collateral suit.⁵⁴

⁴⁷ Peck v. Elliott (1897), 79 Fed. 10.

⁴⁸ Chafee v. Quidnick Co., 13 R. I. 442, at 450.

⁴⁹ Sercomb v. Catlin (1889), 128 Ill. 556, at 565, 21 N. E. 606.

⁵⁰ Smith v. Berz (1905), 125 Ill. App. 125, at 130; contra, Bank v. McLeod, 38 O. S. 174.

⁵¹ See sec. 58, supra.

⁵² Hardee v. Wilson (1914), 129 Tenn. 511, at 513, 167 S. W. 475.

⁵³ Peck v. Elliott (1897), 79 Fed. 10, cases cited; Jenkins v. Purcell

(1907), 29 App. D. C. 209, 9 L. R. A. (N.S.) 1074, at 1076; Pac. Coast Pipe Co. v. Conrad City Water Co. (1917), 245 Fed. 846; Vallery v. Denver & R. G. R. Co. (1916), 236 Fed. 176, at 179, cases cited.

⁵⁴ State v. Shelton (1911), 142 S. W. 417, 238 Mo. 281; Thompson v. Greely, 17 S. W. 962, 107 Mo. 577; State, ex rel., v. Foster, 225 Mo. 205, 125 S. W. 184; Rousseau v. Call (1915), 85 S. E. 414, 169 N. C. 173.

A collateral attack may always be made when the court was without jurisdiction⁵⁵ by a purchaser of property from the receiver⁵⁶ or other interested party.⁵⁷

Mandamus will not lie to compel the annulment of an interlocutory decree appointing a receiver. While no appeal may lie from such a decree, yet it may be assigned as error on appeal from a final decree if one should be rendered against the petitioner, therefore mandamus will not lie.⁵⁸

Although a bill asking for a receiver may be demurrable because it did not ask for process, nevertheless when a receiver was appointed under such a bill and had taken possession of the property, such appointment was held not to be void and could not be successfully attacked collaterally by one not a defendant in the receivership proceedings.⁵⁹

When the order appointing a receiver is only collaterally involved it can not be attacked except upon want of jurisdiction to make it.⁶⁰ It is sufficient to him that the receiver was duly appointed.⁶¹ An attack upon the appointment of a receiver must be made in the court where appointment is made⁶² and by a party to the suit except an attack on the jurisdiction.⁶³

§ 76. Jurisdiction over Property Taken by Receiver under Color of Authority Only. Property levied on by attachment or taken in execution is brought by the writ within the scope of the jurisdiction of the court whose process it is, and as long as it remains in the possession of the officer it is in the custody of the law. It is the bare fact of that possession under claim

⁵⁵ *Harned v. Beacon Hill R. E. Co.* (1911), 80 Atl. 805, 9 Del. Ch. 232.

⁵⁶ See ch. XXIV, "Receivers' Sales."

⁵⁷ See ch. XXIV, "Receivers' Sales."

⁵⁸ *Ex parte Hurd* (1908), 47 So. 264, 157 Ala. 368.

⁵⁹ *Benjamin v. Staples* (1908), 47 So. 425, 93 Miss. 507.

⁶⁰ *Title Trust Co. v. Grider*

(1908), 94 Pac. 601, 152 Cal. 746, at 748; *Rabbe v. Astor Trust Co.* (1909), 61 N. Y. Misc. 650, 114 N. Y. S. 131, at 133.

⁶¹ *Wright v. Nostrand*, 94 N. Y. 31.

⁶² *Backenstoe v. Kline* (1906), 31 Penn. Sup. Ct. 268.

⁶³ *Backenstoe v. Kline* (1906), 31 Penn. Sup. Ct. 268.

and color of that authority that furnishes to the officer of the court whether marshal, sheriff or receiver ⁶⁴ complete immunity from the process of every other jurisdiction that attempts to dispossess him. ⁶⁵

The question of the lawfulness or unlawfulness of the holding of possession by the court is wholly immaterial as to the court protecting its possession. ⁶⁶

When property in the possession of a third person claiming ownership is attached by a marshal on mesne process issuing out of a circuit court of the United States, claims by such third party should be asserted by proceedings *pro interesse suo*. It is the duty of the court to prevent its process from being abused to the injury of third persons and to protect its officers and its own custody of property in their possession, so as to defend and preserve its jurisdiction, for no one is allowed to question or disturb that possession except by leave of the court. ⁶⁷

If the court had jurisdiction of the subject-matter and the parties in the proceeding in which the receiver was appointed, the appointment of the receiver can not be attacked collaterally. ⁶⁸

Said Van Fleet on Collateral Attack: "If any jurisdictional question is debatable or colorable, the tribunal must decide it, and an erroneous conclusion can only be corrected by some proceeding provided by law for so doing, commonly called, Direct attack. It is only where it can be shown, lawfully,

⁶⁴ *Krippendorf v. Hyde* (1883), 110 U. S. 276, at 283, 28 L. ed. 145.

⁶⁵ *Covell v. Heyman* (1883), 111 U. S. 176, at 184, 28 L. ed. 390; *Lewis v. Dillard* (1896), 76 Fed. 688, at 690.

⁶⁶ *Electrical Supply Co. v. Put-in-Bay Waterworks L. & Ry. Co.* (1898), 84 Fed. 740, at 743; also *Compton v. Jessup* (1895), 15 C. C. A. 376, at 412, 68 Fed. 257.

⁶⁷ *Daniel Ch. Pr.*, ch. 39, sec. 4, p. 1744; *Krippendorf v. Hyde* (1883), 110 U. S. 276, at 283, 28 L. ed. 145; see *Richards v. The People* (1876), 81 Ill. 551, at 556; *Brooks v. Greathed*, 1 Jac. & W. 176; *Skinner v. Maxwell*, 68 N. C. 400; *In re Day*, 34 Wis. 638; *The People v. Weighley* (1895), 155 Ill. 491, at 502, 40 N. E. 300.

⁶⁸ *The People v. Weighley* (1895), 155 Ill. 491, at 502, 40 N. E. 300; *Richards v. The People* (1876), 81 Ill. 551, at 556.

that some matter or thing essential to jurisdiction is wanting, that the proceeding is void collaterally.”⁶⁹

When a court undertakes to reach out and appoint a receiver over property which was not the subject-matter of the controversy, it has no colorable jurisdiction to do so, and an order so made has been declared to be utterly void and null. Such void or null orders can be attacked collaterally.⁷⁰

§ 77. When Court Has Wrongfully Taken Possession. If the court in fact has no jurisdiction of the original case and yet takes actual possession of the res through its receiver, what remedies have those affected by the receivership? The actual custody of the court is the criterion and not the lawfulness or the unlawfulness of the holding of possession by the court. If a marshal takes possession of property under a writ though illegally issued and levied, yet not void on its face, such property is in a sense in custodia legis, nevertheless the court appointing such marshal acquires exclusive jurisdiction to dispose of such property brought into its custody, under color of its authority, although by illegal means, and to decide all questions of conflicting right thereto.⁷¹

Such a court therefore must defend its possession and hold the property subject to its orders and it also assumes the obligation to undertake to afford redress to those whom it prevents, by withholding the property from obtaining relief elsewhere.⁷²

And where a vacation of the order appointing a receiver would result in a dissipation of the assets, complainant may not be allowed a writ of prohibition compelling the vacation of the order appointing a receiver.⁷³

⁶⁹ Van Fleet (edition 1892), Col-lateral Attack, p. 3, sec. 1.

⁷⁰ Branner v. Webb (1901), 10 Kan. App. 217, 63 Pac. 274; Webb v. Branner (1902), 65 Kan. 856, 68 Pac. 1133; Bowman v. Hazen (1904), 69 Kan. 682, at 698, 77 Pac. 589; cases cited, Vila v. Grand Island E. L. I. & C. S. Co. (1903), 63 L. R. A. (Neb.) 791, 68 Neb.

222, 233, 94 N. W. 136, 97 N. W. 613.

⁷¹ Gumbel v. Pitkin (1887), 124 U. S. 131, at 156, 31 L. ed. 374.

⁷² Electrical Supply Co. v. Put-in-Bay (1898), 84 Fed. 740, at 743; see also Compton v. Jessup (1895), 68 Fed. 263, at 279.

⁷³ First Nat. Bk. v. Superior Ct. (1909), 107 Pac. 322, 12 Cal. A. 335.

CHAPTER IV

COURTS IN WHICH A RECEIVER MAY BE APPOINTED

ANALYSIS

§ 78. English Chancery Courts Appointing Receiver.

(a) Effect of Company's Acts of 1845 and 1863 on Appointment of Receiver.

(b) Effect of Probate Act of 1857 on Appointment of Receiver.

(c) Effect of Judiciary Act of 1873 on Appointment of Receiver.

§ 79. English Courts Appointing Receiver by Way of Equitable Execution.

§ 80. Canadian Courts Appointing Receiver by Way of Equitable Execution.

§ 81. Supreme Court of United States Appointing Receiver.

(a) Original Jurisdiction.

(b) Appellate Jurisdiction.

§ 82. Circuit Courts of Appeals of United States Appointing Receiver.

(a) No Original Jurisdiction in United States Circuit Court of Appeals.

(b) Appeal from Interlocutory Order Appointing Receiver.

§ 83. District Courts of United States Appointing Receiver.

§ 84. Chancery State Courts Appointing Receiver.

§ 85. Law and Equity State Courts Appointing Receiver.

§ 86. Code State Courts Appointing Receiver.

§ 78. English Chancery Courts Appointing Receiver. The jurisdiction of the English courts of chancery to appoint receivers is very old.¹ The appointment of a receiver being an equitable proceeding was confined to those courts which alone had equity jurisdiction, namely the chancery courts.² The jurisdiction to appoint receivers in England was confined to the chancery courts until 1845.

¹ *Newdigate Colliery, etc., v. The Company* (1912), 1 Ch. 472.

² *Bainbrigge v. Baddeley* (1851), 3 Mac. & G. 413, at 419; *Evans v. Coventry* (1854), 5 DeG. M. & G. 910, at 916.

(a) Effect of Company's Acts of 1845 and 1863 on Appointment of Receiver. The Company's Clause Consolidation Act of 1845 was passed providing for the appointment of receiver in certain cases by any of the superior courts of law and equity.

(b) Effect of Probate Act of 1857 on Appointment of Receiver. In 1857, an act to amend the law relating to probate and letters of administration in England ³ was passed, giving the court of probate power to appoint a receiver of the real estate of any deceased person pending any suit in the court touching the validity of any will of such deceased person, by which his real estate might be affected.⁴

The Company's Clause Act of 1863 ⁵ gave the holder of debenture stock, when the interest was in arrears, a right to sue in any court of competent jurisdiction for the interest in arrears and required the appointment, in England or Ireland, of a receiver, and in Scotland, of a judicial factor.⁶

(c) Effect of Judiciary Act of 1873 on Appointment of Receiver. In 1873, the English parliament passed a judicature act, which among other things extended the power to appoint a receiver to all the divisions of the high court, to the court of appeal and to every inferior court having jurisdiction in equity or at law and in equity and in admiralty respectively, as regards all causes of action within its jurisdiction.

By §(25)8⁷ it was expressly stated that a receiver may be appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that such order shall be made. Under the jurisdiction given by §(25)8 of the Judicature Act of 1873,⁸ to appoint a receiver in all cases where it appears just or convenient to do so, a receiver has been appointed of a legal interest in land which could not be conveniently taken under a writ of elegit.⁹ But

³ 20 and 21 Vic. (1857), ch. 77.

⁴ 20 and 21 Vic. (1857), ch. 77, par. 71.

⁵ 8 and 9 Vic., ch. 16, pars. 53 and 54.

⁶ 26 and 27 Vic., ch. 118, 825.

⁷ English Judicature Act (1873), 36 and 37 Vic., ch. 66.

⁸ 36 and 37 Vic., ch. 66.

⁹ In re Pope (1886), 17 Q. B. D. 743 C. A.; see also Orr v. Grierson (1890), 28 L. R. Ir. 20 C. A.; Pease v. Fletcher (1875), 1 Ch. D. 273.

notwithstanding the power of the court to appoint a receiver in all cases in which it shall appear "just and convenient," a receiver will not be appointed by way of equitable execution except in a case when such an appointment could be made before the acts—that is, when the only difficulty was an impediment which the court of chancery could remove.¹⁰ And it is still necessary to show the court "the existence of the circumstances creating the equity on which alone the jurisdiction arises."¹¹

"The introduction of the twenty-fifth section of the Judicature Act of 1873 does not curtail the power of the court to grant injunctions or to appoint receivers: it enlarges it. It has not revolutionized the law, but it has enabled the court to grant injunctions and receivers in cases in which it used not to do so previously. I will not say where it had no jurisdiction to do so, that would be going too far, but where in practice it never did so, as for example, in trespass and in the case of a first mortgagee who was out of possession."¹² Some of the cases in England construing the wording of the Judicature Act "just and convenient in the interest of justice" and what effect the act had on the previous practice and procedure are shown in the cases below cited.¹³

§ 79. English Courts Appointing Receiver by Way of Equitable Execution. In England the chancery court appointed receivers by way of equitable execution as far back as 1788.¹⁴ In 1873 the English Judicature Act¹⁵ was passed and extended the jurisdiction to appoint receivers *pendente lite*, and receive-

¹⁰ *Holmes v. Millage* (1893), 1 Q. B. 551 C. A.; *Cadogan v. Lyric Theatre, Ltd.* (1894), 3 Ch. 338 C. A.; see *Manchester, etc., v. Parkinsons* (1888), 22 Q. B. D. 173 C. A.; *Harris v. Beauchamp* (1894), 1 Q. B. 801 C. A.; *Edwards v. Picard* (1909), 11 K. B. D. 903 C. A.

¹¹ *In re Shephard v. Shephard* (1889), 43 Ch. D. 131 C. A.

¹² *Cummins v. Perkins, Lindley M. R.* (1899), 1 Ch. D. 20 C. A.

¹³ *Beddow v. Beddow* (1878), 9 Ch. D. 89; *Anglo-Italian Bank v. Davies* (1878), 9 Ch. D. 275; *In re Francke* (1888), 57 L. J. Ch. 437; *Prytherch v. Williams* (1889), 42 Ch. D. 590; *Smith v. Cowell* (1880), 6 Q. B. D. 75; *Edwards & Co. v. Picard* (1909), 11 K. B. D. 903 C. A.

¹⁴ *Bryan v. Cormick*, 1 Cox 422.

¹⁵ Judicature Act (1873), 36 and 37 Vic. ch. 66.

ers by way of equitable execution for the chancery court to other courts. "The main object of the act was to assimilate the transaction of equity business and common-law business by different courts of judicature. It has been sometimes inaccurately called 'the fusion of law and equity,' but it was not a fusion or anything of the kind; it was the vesting in one tribunal the administration of law and equity in every cause, action or dispute, which should come before that tribunal. The legislature did not create a new jurisdiction, but simply transferred the old jurisdiction of the courts of law and equity to the new tribunal and then gave directions to the new tribunal as to the mode in which it should administer the construed jurisdiction."

The chancery court by its power to act in personam brings the party having the legal title or the possession of the property of the judgment debtor into court, appoints a receiver to receive such property or interest in property of the judgment debtor and orders the defendant in the chancery proceeding to deliver up such property or interest in property to the receiver. What the receiver gets is the possession of the property in which the defendant has an interest. The receivership prevents the defendant from disposing of this interest and the receiver by sale of the property or otherwise makes this interest of the defendant available for satisfaction of the plaintiff's judgment.¹⁶

The appointment of a receiver over the land or other property, the title or possession of which is in another than the judgment debtor, does not prejudice the rights or titles of others than the judgment debtor, but the judgment debtor's equitable interest in that property is made to respond to the plaintiff's judgment.¹⁷

§ 80. Canadian Courts Appointing Receiver by Way of Equitable Execution. The purpose of the words in the Judicature Act, Revised Statutes Ontario, 1897, ch. 51, sec. 58, subsec. 9,

¹⁶ Stephens Com. on the Law of England, Vol. III, at 566.

¹⁷ Walmsley v. Mundy (1884), 13 Q. B. D. 811.

was so far as they apply to such a case as this, merely to expressly confer upon all the courts that jurisdiction which under the designation of equitable execution had before the fusion of law and equity been exercised by the court of chancery alone.¹⁸

Where the plaintiffs were judgment creditors of the defendant and were also trustees entitled to receive the rent and other property in respect of which they asked that they should be appointed receivers to which the defendant was beneficially entitled;¹⁹ held that there was no impediment in the way of their receiving such rents and other property and their motion for an order appointing the receiver was unnecessary.²⁰

A receiver will not be appointed by way of equitable execution on behalf of a judgment creditor to receive the amount of a claim for unliquidated damages which his debtor is seeking to recover in a pending action.

The jurisdiction of the high court and its branches in this respect, under the (Ontario) Judicature Act, is precisely that which was formerly exercised by the court of chancery, and nothing has been brought within the reach of a creditor by the receivership clause of the Judicature Act which could not have been realized by some legal or equitable remedy before the act was passed.²¹

§ 81. Supreme Court of United States Appointing Receiver.

"The judicial power of the United States shall be vested in one supreme court and in such inferior courts as the congress may from time to time ordain and establish."²²

The Supreme Court of the United States alone derives its jurisdiction directly and immediately from the constitution, and no legislative power can deprive it of that jurisdiction.²³

¹⁸ In re Asselin v. Cleghorn, 6 Ont. L. R. 170.

¹⁹ O'Donnell v. Faulkner, 1 Ont. L. R. 21.

²⁰ See Holmes v. Millage (1893), 1 Q. B. 551; Harris v. Beauchamp (1894), 1 Q. B. 801; Cadogan v. Lyric Theatre (1894), 3 Ch. 338.

²¹ The Central Bank v. Ellis (1896), 27 Ont. R. 583.

²² Constitution of United States, art. III, sec. 1.

²³ United States v. Hudson (1812), 7 Cranch 31, 3 L. ed. 259; Stevenson v. Fain (1904), 195 U. S. 167, 49 L. ed. 142.

“The judicial power shall extend to all cases in law and equity, arising under the constitution, the laws of the United States, and treaties made or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversy to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof and foreign states, citizens or subjects.”²⁴

“In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.”²⁵

The rules of the Supreme Court of the United States adopted August 8, 1791,²⁶ provided as follows: “This court considers the former practice of the courts of king’s bench and chancery, in England, as affording outlines for the practice of this court, and will from time to time make such alterations therein as circumstances may render necessary.” This rule was originally Rule No. 7, but during the December term, 1858,²⁷ became Rule No. 3, amended January 7, 1884, republished in 108 U. S. 574.²⁸

New rules of the supreme court were promulgated in 1912²⁹ and made effective February 1, 1913. Old Rule No. 3 referred to above, was then abrogated and Rule No. 18 seems to take its place.

Rule No. 18, Pleadings—Technical Forms Abrogated. “Unless otherwise prescribed by statute or these rules, the technical forms of pleadings and equity are abolished.”³⁰

²⁴ Constitution of United States, art. III, sec. 2.

²⁵ Constitution of United States, art. III, sec. 2.

²⁶ Original Rule 7, 2 Dall. 411.

²⁷ 21 How. V.

²⁸ Promulgated December 22, 1911, 222 U. S. 669.

²⁹ 224 U. S. 647.

³⁰ 224 U. S. 649.

(a) Original Jurisdiction. The original jurisdiction of the Supreme Court of the United States is restricted to the two classes of cases mentioned in the Constitution of the United States,³¹ viz., in cases affecting ambassadors, other public ministers and consuls, and in cases in which a state is a party.³² This limitation has always been considered restrictive of any other original jurisdiction.³³

“The United States Supreme Court and the circuit courts of appeal and the circuit court of the United States sitting in equity have the full jurisdiction of the English courts of chancery as they existed at the time of the adoption of the Constitution of the United States.”³⁴

It was the practice of the chancery courts of England to appoint receivers in cases properly pending before those courts, therefore, the United States Supreme Court had, when first established, power to appoint receivers, and has today.

No case wherein the superior court appointed a receiver in a case originating there is to be found, but there is no ruling to the effect that no receiver would be appointed in such a case.

“At a very early period of the government, a doubt arose whether the Supreme Court of the United States could exercise its original jurisdiction without a previous act of congress regulating the process and mode of proceeding. But the court, upon much consideration, held that although congress had undoubtedly the right to prescribe the process and mode of proceeding in such cases as fully as in any other court, yet the omission to legislate on the subject could not deprive the court of the jurisdiction conferred; that it was a duty imposed upon the court; and in the absence of any legislation by congress, the court itself was authorized to prescribe its mode and form of proceeding, so as to accomplish the end for which jurisdiction was given.”³⁵

³¹ Constitution of United States, art. III, sec. 3.

³² *Martin v. Hunter* (1816), 1 Wheat. 304, at 330, 4 L. ed. 97.

³³ *United States v. Haynes* (1887), 29 Fed. 691, at 696; *Ex*

parte Vallandigham (1863), 1 Wall. 243, at 252, 17 L. ed. 589.

³⁴ *Underground Elect. Ry. v. Owlsley* (1909), 176 Fed. 26.

³⁵ *Florida v. Georgia* (1854), 17 How. 478, at 491, 15 L. ed. 181.

(b) Appellate Jurisdiction. “In all other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exception and under such regulations as the congress shall make.”³⁶

“The judicial action of all inferior courts established by congress may in accordance with the constitution be subjected to the appellate jurisdiction of the Supreme Court of the United States.”³⁷

The appellate powers of the Supreme Court of the United States are given by the constitution. But they are limited and regulated by the various judiciary acts and by such other acts as have been passed upon the subject.³⁸

Actual jurisdiction under the appellate power of the Superior Court of the United States is confined within such limits as congress sees fit to prescribe.³⁹

No power is more clearly conferred by the Constitution and laws of the United States than the powers of the Supreme Court of the United States to decide ultimately and finally, all cases arising under such constitution and laws; and for that purpose to bring to that court for revision by writ of error, the judgment of a state court, when such questions have arisen, and the right claimed under them derived by the highest judicial tribunal in the state.⁴⁰

Most of the cases in the Supreme Court of the United States on the subject of receivers review the appointment of a receiver by the lower court, or determine questions arising out of the original suit. While these questions are being reviewed by the supreme court, the receiver who was appointed by the court below is holding the property.

In *Railroad Co. v. Ketchum*, 1877,⁴¹ wherein pending an appeal from an uncontested railroad foreclosure, a motion was made

³⁶ Constitution of United States, art. III, sec. 1; *Stevenson v. Fain* (1904), 195 U. S. 167, 49 L. ed. 142.

³⁷ *United States v. Coe* (1894), 155 U. S. 76, 42 L. ed. 1195.

³⁸ *Durousseau v. United States*, 6 Cranch 307, 314, 3 L. ed. 232.

³⁹ “*The Francis Wright*” (1881), 105 U. S. 381, at 385, 26 L. ed. 1100.

⁴⁰ *Ableman v. Booth* (1858), 21 How. 506, 16 L. ed. 169.

⁴¹ *Pacific Railroad Co. v. Ketchum* (1877), 95 U. S. 1, 24 L. ed. 347.

for a rule to show cause why a receiver should not be appointed. Chief Justice Waite said: "Without undertaking to decide whether a case may not arise in which we would exercise the power of appointing a receiver, pending an appeal in this court, we are clearly of the opinion that we ought not to do so upon the showing made here."

§ 82. Circuit Courts of Appeals of United States Appointing Receiver. The circuit courts of appeals of United States were established by the act of March 31, 1891.⁴² The circuit court of appeals of the United States is not provided for in the Constitution of the United States, therefore this jurisdiction must be and is prescribed by the act of congress creating that court.

(a) No Original Jurisdiction in United States Circuit Court of Appeals. The circuit courts of appeals of United States have no original jurisdiction. Their jurisdiction is appellate as limited and established by the act.⁴³ And the courts can review no cause except by an appeal taken or a writ of error sued out as prescribed.⁴⁴ The courts of appeals have not been vested with a general control or supervision over the courts below them.

(b) Appeal from Interlocutory Order Appointing Receiver. It is the rule that an appeal will only lie from a final order and an order appointing a receiver is not a final order, but an interlocutory order. However, under sec. 7, act March 3, 1891, as amended June 6, 1900,⁴⁵ the right of appeal is given to the circuit court of appeals of the United States "where upon hearing in equity * * * an injunction shall be granted or continued or a receiver appointed by an interlocutory order or decree." Thus we find such appeals in the circuit courts⁴⁶ which would not exist except by special statute.

⁴² 26 Stat. at L. (U. S.) 826.

⁴³ *Travis County v. King Iron B. Co.* (1899), 97 Fed. 690.

⁴⁴ 26 Stat. at L. (U. S.) 826.

⁴⁵ 31 Stat. at L. (U. S.) 660.

⁴⁶ *Pacific Northwest P. Co. v. Allen* (1901), 109 Fed. 515; *Cabiniss v. Reco Min. Co.* (1902), 116 Fed

320; *Texas Assn. v. Stonow* (1899), 92 Fed. 5; *Smith v. Vulcan Iron Wks.* (1897), 165 U. S. 518, 41 L. ed. 810; *Mayor v. Africa* (1896), 77 Fed. 501; also *Richmond v. Atwood* (1892), 52 Fed. 10; *Green v. Mills* (1895), 69 Fed. 852.

The right given by sec. 7 of the Judiciary Act of March 3, 1891, is a privilege or option, and whether availed of or not it in no way affects or diminishes the right to appeal from the final decree,⁴⁷ and yet a decree which is rendered after full hearing on the merits when the whole record is before the circuit court of appeals and in order to determine the rightfulness of the injunction the court necessarily examines the whole case on its merits, and reaches a conclusion that there is no infringement of the patent, it may not only reverse the decree and dissolve the injunction, but may also vacate the order for an accounting and order the bill dismissed, thus rendering such a decree as the lower court should have rendered in the whole case.⁴⁸

The seventh section of the act of March 7, 1891, has been modified by the act of February, 1895, and the final disposition of a case by the circuit court of appeals, or an appeal from an interlocutory order, is one of equitable convenience to be applied only when the full record is brought before it and when the decree below was entered after a full hearing.⁴⁹

§ 83. District Courts of United States Appointing Receiver.

The circuit courts of the United States were abolished and the powers transferred to the district courts of United States in 1911. The district courts of the United States not being courts provided for directly in the Constitution of the United States, they have only that jurisdiction which is given them by the acts of congress. They have original jurisdiction in a number of cases as defined by the statutes.⁵⁰ Such courts have jurisdiction in proceedings ancillary or supplemental to the main suit pending in such courts. Diverse citizenship is not material in

⁴⁷ *Marden v. Campbell* (1895), 67 Fed. 809; *Jones v. Munger* (1895), 50 Fed. 785.

⁴⁸ *Richmond v. Atwood* (1892), 52 Fed. 10.

⁴⁹ *Marden v. Campbell* (1895), 67 Fed. 809.

⁵⁰ *Ex parte United States* (1912), 226 U. S. 420, 57 L. ed. 281; United States Judicial Code, March 3, 1911, sec. 126, 36 Stat. at L. 1087.

ancillary and dependant proceedings where jurisdiction exists over the subject of litigation.⁵¹

Judge Putnam said there are three essential conditions compliance with which is necessary to justify the appointment of a receiver in a federal court:

First. That the case be fairly within the jurisdiction of the court, having in view both the limited jurisdiction of federal tribunal and the true nature of proceedings in equity.

Second. That some proper final relief in equity is asked for in the bill which will justify the court in proceeding with the case; and

Third. That the circumstances calling for a receiver be of a clear and urgent character.⁵²

The federal courts when they have possession of the property by receivers and are engaged in administering the trusts pertaining to it, may entertain jurisdiction of any claim whose rights or interests would be injuriously affected by the action of the court in dealing with the property and administering the trust, without regard to the amount in controversy, the nature of the controversy, or the citizenship of the parties.⁵³

Where assets are in the course of administration, all persons entitled to participate may come in, under the jurisdiction acquired between the original parties, by ancillary or supplemental proceedings, even though jurisdiction would be lacking if such proceedings had been had independently.⁵⁴

§ 84. Chancery State Courts Appointing Receiver. There are a few states, namely, Alabama, Delaware, Mississippi, New

⁵¹ *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145; *Morgan's Co. v. Texas C. Ry.*, 137 U. S. 171, at 201, 34 L. ed. 625.

⁵² *Hutchinson v. Am. P. C. Co.*, 104 Fed. 182-185; approved, *Zuber v. Micmac M. Co.* (1910), 180 Fed. 625.

⁵³ *Blake v. Pine Mountain, etc.* (1896), 76 Fed. 624; *Compton v.*

Jesup (1895), 68 Fed. 263; *McBee v. Marietta* (1891), 48 Fed. 243; *White v. Ewing* (1895), 159 U. S. 36, 40 L. ed. 67; *In re Tyler* (1893), 149 U. S. 164, 37 L. ed. 689.

⁵⁴ *Stewart v. Dunham*, 115 U. S. 61, at 64, 29 L. ed. 329; *Richmond v. Irons*, 121 U. S. 27, at 52, 30 L. ed. 864; *Rouse v. Letcher* (1894), 156 U. S. 47, at 49, 39 L. ed. 341.

Jersey and Tennessee, wherein chancery courts are maintained as separate and distinct tribunals apart from the so-called common-law courts. These chancery courts follow generally the ancient chancery procedure and such courts appoint receivers in actions properly brought before them.

To determine the jurisdiction of these chancery courts we must examine carefully the constitution and statutes of the respective states.

Appeals from the chancellor are directed to the court of errors and appeals in Delaware.⁵⁵

The Supreme Court of Alabama has appellate jurisdiction coextensive with the state to review the decisions and decrees of the courts of chancery of the state.⁵⁶ It is impossible, within the limits of this work, to go into the jurisdiction of all the state courts of chancery of the United States, therefore we can just indicate general lines of their jurisdiction. The constitution and statutes creating the courts must be carefully gone into to ascertain the limits of jurisdiction.

§ 85. Law and Equity State Courts Appointing Receiver.

Florida, Illinois, Maine, Maryland, Massachusetts, Michigan, New Hampshire, Pennsylvania, Rhode Island, Vermont, Virginia and West Virginia are so-called law and equity states. They do not have a distinct chancery tribunal in their practice, but they adhere to chancery forms and chancery pleadings following generally the practice in the United States courts. The courts of those states having general chancery jurisdiction have power to appoint receivers.

The Supreme Court of Vermont has held that when it entertains chancery appeals, it does not sit as a court of chancery, but only as a court of error,⁵⁷ and for this reason "it is without authority to appoint a receiver."⁵⁸ It would therefore seem that even after the case had been brought to

⁵⁵ Constitution of Delaware, art. V, sec. 7.

⁵⁶ *Lewis v. Lewis, Minor*, 35 Ala. 38.

⁵⁷ *Dietrich v. Hutchinson* (1901), 73 Vt. 134, at 140, 50 Atl. 810.

⁵⁸ *Roberts v. W. H. Hughes Co.* (1913), 86 Vt. 460, 83 Atl. 982.

the supreme court for review and a receiver were necessary to protect the property, application for the appointment of such receiver should be made in the lower or chancery court.

§ 86. Code State Courts Appointing Receiver. Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Washington, Wisconsin and Wyoming, are so-called code states, which have adopted the so-called codes of civil procedure abolishing the distinction in form between the pleadings in suits at law and actions in equity. These codes have not, however, abolished equitable rights and equitable remedies. Courts in these states having general equity jurisdiction have power to appoint receivers.

It will be found that a number of these codes indicate definitely what courts can appoint a receiver.⁵⁹ Sometimes a court is mentioned and given power to appoint a receiver which has not general equity powers. Such statutes must be scrutinized very carefully and the constitution and general statutes of the state read together with such statutes to ascertain in what cases a receiver can be appointed and what powers the court has over him after he is appointed. Many of these state codes not only indicate what courts may appoint a receiver, but also indicate in what cases a receiver may be appointed. Such statutes may be looked upon as a codification, in part, of the rules and usages of equity governing the appointment of receivers. They are not generally looked upon as restricting the court's rights of appointing receivers. They may, however, at times enlarge and slightly extend the horizon of the rules and usages of equity pertaining to the appointing of receivers.

⁵⁹ See ch. XXXV, Vol. 2, *infra*, "Statutes Affecting the Appointment of Receivers."

CHAPTER V

PURPOSE OF RECEIVERSHIP—CLASSIFICATION OF CASES

ANALYSIS

§ 87. Purposes for Which Receiver May Be Appointed.

Classification of Purposes for Which a Receiver Is Appointed.

§ 88. Classification of Cases of Receiver Pendente Lite to Preserve Property.

§ 89. Classification of Cases of Receivers Pendente Lite to Preserve and Realize Property.

§ 90. Classification of Cases of Receivers after Judgment to Preserve Property.

§ 91. Classification of Cases of Receivers after Judgment to Realize Property.

§ 92. Classification of Cases of Receivers after Judgment to Carry Judgment into Effect.

Receiver Appointed to Execute a Conveyance or Some Other Instrument.

§ 93. Classification of Cases of Receivers after Judgment to Enforce Payment.

§ 94. Miscellaneous Cases wherein Receiver Is Appointed.

§ 87. Purposes for Which a Receiver May Be Appointed.

The purposes for which a receiver is appointed are to preserve property for the litigants,¹ to administer² and realize property for the litigants. If the subject-matter of litigation should be alienated during the litigation and not be in existence when the litigation is ended, the decree of the court would be futile and the courts would be brought into disrepute. To guarantee that the subject of litigation would not be alienated the common-law courts announced the principle of *lis pendens*. The equity courts later on adopted this principle and applied it to equitable suits and equitable proceedings; statutes have also been passed in England and in most of our states extend-

¹ *Young v. Hamilton* (1910), 135 Ga. 339, at 341, 69 S. E. 593.

² *Atlantic Trust Co. v. Dana* (1903), 128 Fed. 209, at 218.

ing the principle of *lis pendens* and at the same time lessening the rigor of its application.

However much the title to property may be protected by the doctrine of *lis pendens*, nevertheless it is frequently necessary for the courts to protect not only the title but the property itself until the termination of the suit. To do this the courts will appoint a receiver.³

Again courts of equity will under creditors' bills or other proper equitable proceedings, take hold of equitable interests in property, administer the property⁴ and apply such equitable interests in property to the payment of the plaintiff's claim. In order to do this, a receiver will be frequently appointed to act as officer of the court in transferring these equitable interests to the claimant or in selling the equitable interests and under orders of the court paying over the proceeds to the plaintiff and others. Under such circumstances the receiver realizes the property for the claimant.

Supplementary proceedings⁵ and proceedings in aid of execution⁶ have by statute in some states taken the place of creditors' bills. Receivers are appointed under supplementary proceedings⁷ and proceedings in aid of execution.

Classification of Purposes for Which a Receiver Is Appointed. First. Generally a receiver is appointed by a court before judgment to preserve property pending judicial proceedings.⁸ Such a receiver is called a *pendente lite* receiver.

Second. A receiver is often appointed pending litigation and before judgment not only to preserve the property for those who may be held ultimately entitled to it,⁹ but sometimes by

³ *Library Assn. v. Library Assn.* (1909), 155 Mich. 663, 119 N. W. 1098; see *Bacon v. Engstrom* (1915), 129 Minn. 229, 152 N. W. 264, 537; *Metropolitan Trust Co. v. North Carolina Lumber Co.* (1908), 162 Fed. 170, at 179.

⁴ *Atlantic Trust Co. v. Dana* (1903), 128 Fed. 209, at 218.

⁵ See cases cited in 33 L. R. A. 550.

⁶ See ch. XXXV, Vol. 2, *infra*.

⁷ *Tomlinson & W. Mfg. Co. v.*

Shatto, 34 Fed. 381; *Dilling v. Foster*, 21 S. C. 334.

⁸ *Owen v. Homan*, 4 H. of L. Cases, 996, at 1030.

⁹ *Metropolitan Trust Co. v. North Carolina Lumber Co.* (1908), 162 Fed. 170, at 179; *Cupit v. Jackson* (1824), 13 Price 734; *White v. Smale* (1856), 22 Beav. 72; *Rochester Tumbler Works v. M. Woodbury Co.* (1913), 215 Mass. 194, at 198, 102 N. E. 438.

intercepting the income to provide a fund for payment to the holder of a charge against the property. As for instance to secure, realize and enforce the payment of a rent charge on certain property.¹⁰ Also in a case by a mortgagee or other incumbrancer in a foreclosure or other case asking the court to appoint a receiver to get in and realize the property for the mortgagee or other incumbrancer, and to collect the rent and profits pending foreclosure.¹¹ In such a case although the rents and profits of the property may not be so specifically mortgaged, nevertheless the receiver collects them and realizes and secures them as part payment of the debt secured by mortgage. Thus the activities of the receiver amount to something more than preserving the corpus of the property mortgaged. Although most American cases follow¹² the English ruling holding that rents and profits go to the receiver, nevertheless the doctrine has been seriously disputed and the contrary held in some states.¹³

Third. A receiver is often appointed after judgment in lower court pending an appeal or review in upper court. This receiver is for the purpose of preserving property.

Fourth. A receiver is often appointed after judgment: (1) To carry the judgment or decree into effect, to execute a deed or do some act. (2) To realize the property of the defendant and make it responsive to the judgment, as to sell the property and distribute the proceeds. (3) And in some cases (generally statutory ones) to wind up the affairs of an insolvent corporation, reduce its property to cash and distribute it among its creditors.¹⁴

¹⁰ *White v. James* (1858), 26 Beav. 191; *Beamish v. Austin* (1875), 9 Ir. Eq. R. 361; *Wilson v. Wilson* (1838), 2 Keen 249; *Metropolitan Trust Co. v. North Carolina Lumber Co.* (1908), 162 Fed. 170, at 179.

¹¹ *Codrington v. Johnson* (1838), 1 Beav. 520, at 524; *Lloyd v. Mason* (1837), 2 M. & C. 487.

¹² *Post v. Dorr*, 2 Ed. Ch. 412; *Hollenbeck v. Donnell*, 94 N. Y. 342, at 346; see 84 Ind. 558 and 3 Sandf. Ch. 69.

¹³ *Marshall, et al., v. Cady* (1899), 76 Minn. 112, at 116, 78 N. W. 978.

¹⁴ *Rochester Tumbler Works v. M. Woodbury Co.* (1913), 215 Mass. 194, at 198, 102 N. E. 438.

§ 88. **Classification of Cases of Receiver Pendente Lite to Preserve Property.** Cases in which receiver pendente lite to preserve property may be divided into:

First Class. Cases wherein there is no person entitled before some judicial determination of rights to hold the property which is subject to litigation.¹⁵ Such cases include: (a) Infants' estates.¹⁶ (b) Lunatics' estates.¹⁷ (c) Decedents' estates.¹⁸

Second Class. Where there are different persons equally entitled before some judicial determination of rights to hold the property which is subject to litigation but from the nature of the property and the relations of the parties to each other there is danger of the property being wasted or destroyed during the litigation. Such cases include: (a) Suits between partners.¹⁹ (b) Suits between co-owners of personalty.²⁰ (c) Suits between co-owners of real estate.²¹ (d) Suits between partners or co-owners of mines.²² (e) Suits between co-owners of irrigation plant.²³

Third Class. Where the person or persons holding title to the property are trustees, quasi trustees or in a sense trustees, or may be held to be trustees of another or others, and are wasting the property and thereby violating the rights of the parties beneficially interested. Such cases include: (a) Suits

¹⁵ Where the property is as it were in medio, in the enjoyment of no one, the court can hardly do wrong in taking possession. *Owen v. Homan* (1853), 4 H. of L. C. 996, at 1030. See ch. VI.

¹⁶ See ch. VI.

¹⁷ See ch. VI.

¹⁸ See ch. VI. *Hill v. Arnold* (1887), 79 Ga. 367, 4 S. E. 751; *Crawford v. Wilson* (1913), 139 Ga. 654, at 663, 78 S. E. 30; *Underground Elect. Ry. v. Owsley*, 176 Fed. 26.

¹⁹ *Patterson v. Patterson* (1910), 184 Fed. 547; *Brooke v. Tucker* (1907), 43 So. 141, 149 Ala. 96; *Lyles v. Williams* (1913), 96 S. C. 290, 80 S. E. 470.

²⁰ *Lyles v. Williams* (1913), 96 S. C. 290, 80 S. E. 470; *Merritt v. Moore* (1907), 104 S. W. 514, 47 Tex. Civ. App. 200, under a Texas statute which is in part a codification of the Usages and Rules of Equity covering the cases in which a receiver may be appointed of property held by co-owners.

²¹ *Lyles v. Williams* (1913), 96 S. C. 290, 80 S. E. 470.

²² See ch. VII. *Roberts v. Eberhardt* (1853), Kay 148; *Barbour v. Lockard*, 9 Ohio Dec. Rep. 254.

²³ *Idaho Fruit Co. v. Great Western Co.* (1909), 17 Ida. 273, 105 Pac. 562.

against trustees generally.²⁴ (b) Suits against administrators or executors already holding property.²⁵ (c) Suits to enforce a mortgage.²⁶ (d) Suits to enforce equitable liens or charges.²⁷ (e) Suits to enforce equitable liens or charges on perishable property.²⁸ (f) Suits by vendor to enforce specific performance of contract.²⁹ (g) Suits for rescission of contract for sale of land.³⁰ (h) Suits to protect remainderman against life tenant.³¹ (i) Suits against corporation before dissolution.³² (j) Suits and proceedings in bankruptcy.³³ (k) Suits to determine right of possession.³⁴ (l) Suits in ejectment seldom.³⁵ (m) Suits to set aside deed of assignment.³⁶

²⁴ *Rousseau v. Call* (1915), 169 N. C. 173, 85 S. E. 414; *Cook v. Flagg* (1916), 233 Fed. 426.

²⁵ See ch. VI, and *Rogers v. King*, 8 Paige 210.

²⁶ *Albritton v. Lott-Blackshear* (1910), 167 Ala. 541, 52 So. 653.

²⁷ *Probasco v. Probasco* (1878), 30 N. J. Eq. 108.

²⁸ *Harned v. Rowand* (1908), 74 N. J. Eq. 264, 69 Atl. 181.

²⁹ *Swisher v. Dunn* (1913), 89 Kan. 412, 131 Pac. 571.

³⁰ See ch. VIII, sec. 130, set seq., *Gibbs v. David* (1875), L. R. 20 Eq. 373.

³¹ See ch. VIII, sec. 138, *Shore v. Shore* (1859), 4 Drew 501.

³² *Guterman & Gould v. Lebanon I. & S. Co.* (1907), 151 Fed. 72; *Durand & Co. v. Howard & Co.* (1914), 216 Fed. 585; *Davis v. Jacksonville P. Ry. Co.* (1913), 180 Ill. App. 1.

³³ See ch. XVII, "Receivers in Bankruptcy Proceedings."

³⁴ *Library Assn. v. Library Assn.* (1909), 155 Mich. 663, 119 N. W. 1098.

³⁵ *Folk v. United States* (1916), 233 Fed. 177. A suit in ejectment is one at law and not in equity. It is one not to quiet title, but to determine title, and is local in its nature. It is not technically considered a suit in equity. It is further a proceeding by one out of possession against one in possession.

Equity will not ordinarily appoint a receiver for property in possession of the defendant. *Bateman v. Superior Court*, 54 Cal. 288; *First National Bank v. Superior Court* (1909), 107 Pac. 322, at 326. Yet we have a case in Pennsylvania where the court appointed a receiver in an ejectment suit and the question of title was tried by a jury. We have furthermore a case of ejectment reported in Texas reports, where the relief asked for was quieting of title and the appointment of a receiver of the profits. *Hughes v. Garrelts* (1913), 35 Okla. 321, 129 Pac. 43.

In a suit by a landlord against his tenant stating that his tenant in possession is insolvent, is allowing the land to deteriorate; that it is doubtful if the crop will pay the rent; that a receiver be appointed to take charge of the entire premises, including the crop; that the defendant be enjoined from interfering with the possession of the receiver; that the premises be decreed to be property of the plaintiff, the action has been held to be in the nature of an equitable action of ejectment and a receiver has been appointed in such a case. *Hunter v. Bowen* (1911), 137 Ga. 258, 73 S. E. 380.

³⁶ *Collins v. Williamson* (1915), 229 Fed. 60.

§ 89. Classification of Cases of Receivers Pendente Lite to Preserve and Realize Property. There are cases in which a receiver pendente lite and before judgment may be appointed not only to preserve the property but even before judgment to impound a fund and realize the security. With few exceptions this classification embraces those cases where the plaintiff who seeks to have the court take the property by means of a receiver and realize it or impound a fund before judgment or decree has a charge or lien against the property created by contract. Such a creditor is more than a simple creditor, his position is analogous to the position of a judgment creditor who may not have a legal lien against the property of the defendant but who has by reason of his judgment in a sense a charge, and by means of a receiver the court may take the defendant's property and apply it to the plaintiff's debt.

A lienholder in certain cases has a right to a receiver before judgment to realize his security because he has a legal or equitable interest in the property by contract.

A judgment creditor after judgment in certain cases has a right to a receiver not because he has a legal or equitable interest in the property by contract, but by reason of his judgment he has either a lien on the property or a charge or such an interest as the court will take care of by the appointment of a receiver.

Cases in which receivers pendente lite are appointed to preserve and realize property include: (a) Suits to enforce a rent charge or an annuity when there is no power to distrain or other legal remedy available.³⁷ (b) Suits to foreclose a mortgage or other lien when the receiver collects the rents and profits and applies them to the mortgage debt, although they are not strictly pledged.³⁸ (c) Exceptional cases where before judgment a simple creditor secures the appointment of a receiver.³⁹

³⁷ See ch. IX, secs. 165, et seq. *Curling v. Marquis of Townshend*, 19 Ves. 629, at 633; *Garfitt v. Allen* (1889), 37 Ch. D. 48, at 50.

³⁸ See ch. IX.

³⁹ See ch. X, sec. 1; *Ballin v. Feist*, 55 Ga. 546.

§ 90. Classification of Cases of Receivers after Judgment to Preserve Property. Cases in which a receiver after judgment to preserve property may be divided into: (a) Cases to preserve the property that it may be available to satisfy the decree.⁴⁰ (b) Cases to preserve the property pending an appeal.⁴¹

§ 91. Classification of Cases of Receivers after Judgment to Realize Property.^{41a} Cases in which a receiver may be appointed after judgment to realize the property may be divided into: (a) Cases to foreclose a mortgage when a receiver is appointed after judgment to sell the property and distribute the proceeds.⁴² (b) Cases in which a decree of dissolution of a corporation has been entered and a receiver is appointed as the statute therein provides to collect and distribute the property.⁴³

§ 92. Classification of Cases of Receivers after Judgment to Carry Judgment into Effect. A court of chancery enforces its own decrees by a writ of sequestration,⁴⁴ writ of assistance, writ of possession, writ of injunction, appointment of receiver and contempt proceedings. A court of chancery jurisdiction also aids other courts in the enforcement of their decrees.

It sometimes happens that a defendant is ordered by the judgment to perform a certain act. Formerly if he did not do this, a writ of sequestration was issued against his property and his property was held by the sequestrator by order of the court until the defendant performed the order of the court.⁴⁵

⁴⁰ *Kreling v. Kreling* (1897), 118 Cal. 421, at 423, 50 Pac. 549.

⁴¹ *O'Neill v. Kilduff* (1908), 81 Conn. 116, 70 Atl. 640; *Young v. Germania Savings Bank* (1909), 133 Ga. 609, 66 S. E. 925.

^{41a} See sec. 93, *infra*, "Classification of Cases of Receivership after Judgment to Enforce Payment."

⁴² See ch. IX, sec. 140, *et seq.*

⁴³ *Rochester Tumbler Works v. M. Woodbury Co.* (1913), 215 Mass. 194, at 198, 102 N. E. 438; *Denver City Water Works v. Am. Water Works* (1912), 81 N. J. Eq. 139, 85 Atl. 826.

⁴⁴ *Halsbury, Laws of England, "Equity,"* Vol. XIII, p. 56.

⁴⁵ 1 Barb. Ch. Pr. 68; *Van Santvoord's Eq. Pr.*, p. 10 and p. 642.

Today in most states ⁴⁶ the statutes provide that receivers may be appointed to accomplish what the defendant is ordered to do but refuses.

This provision of the code may be said to embrace all cases of the sequestration of property as formerly issued for the purpose above set out. The rights of the receiver and the powers of the court in the premises are broader than they were under the old writ of sequestration.⁴⁷

Receiver Appointed to Execute a Conveyance or Some Other Instrument. Cases arise where a conveyance is directed to be made,⁴⁸ or satisfaction of an instrument acknowledged and the party is absent, so as not to be amenable to process of contempt and has no property to be sequestrated. In such cases the courts formerly appointed a referee or commissioner to execute the instrument. By statute in many of the states a receiver may do this under the above provision "to carry the judgment into effect."

Under the old New York Code ⁴⁹ there was a provision "after judgment to dispose of the property according to the judgment." This provision in the present New York code is coupled up with the provision just above quoted "after judgment to carry the judgment into effect."

In the case of sales on judgments of foreclosure in partition suits, etc., it is necessary to have a referee master commissioner to make the deed and in addition distribute the property. The New York statute permits this to be done by a receiver.⁵⁰

§ 93. Classification of Cases of Receivers after Judgment to Enforce Payment. This is the most important classification of cases in which a receiver is appointed after judgment. A

⁴⁶ New York Civil Code, Old No. 244; New York Civil Code, New No. 713; Ohio General Code (1910), sec. 11894, subsections 3 and 4.

⁴⁷ Kreling v. Kreling (1897), 118 Cal. 421, at 423, 50 Pac. 546.

⁴⁸ See ch. XII. Scadden Flat, etc., v. Scadden (1898), 121 Cal.

41, 53 Pac. 440; Pierce v. Finerty (1911), 76 N. H. 38, at 48, 76 Atl. 194, 79 Atl. 23.

⁴⁹ New York Code of 1848, amended 1858, sec. 244.

⁵⁰ New York Code of 1848, amended, present sec. 713.

chancery court or court with chancery powers aids judgment creditors in collecting the judgment when they can not be collected by issuing ordinary execution and other legal methods, and by appointing a receiver of the property of the judgment debtor or his interest in property. In America such receivers are appointed under creditor's bills, and in England the court accomplishes the same ends by appointing a receiver in proceedings which they term an "action for a receiver by way of equitable execution."

§ 94. Miscellaneous Cases wherein Receiver Is Appointed.

There are a number of cases wherein a receiver will be appointed which really fall within one or the other of the classifications mentioned in this chapter. But there are some features which stand out in these cases so prominently that they impel us to place them under headings indicating these prominent features. We do this mainly for reference purposes: (a) Receivers when payment is to be made out of a particular fund.⁵¹ (b) Receivers on the ground of fraud.⁵² (c) Receivers on the ground of insolvency.⁵³ (d) Receivers after assignment.⁵⁴ (e) Receivers in creditors' suits before judgment which cases are somewhat exceptional.⁵⁵ (f) Receivers in equity suits to preserve local assets when suit is pending in foreign jurisdiction concerning these local assets.⁵⁶ (g) Receiver to preserve perishable property.⁵⁷ (h) Receiver to preserve crops.⁵⁸ (i) Receiver to pay delinquent taxes.⁵⁹ (j) Receiver for property about to be removed from jurisdiction.⁶⁰ (k) Receiver of insurance agency.⁶¹ (l) Receiver of oil lands.^{61a}

⁵¹ See ch. X, sec. 172. *Title Ins. Co. v. Grider* (1908), 152 Cal. 742, 94 Pac. 601.

⁵² See ch. X, sec. 713. *Ellett v. Newman*, 92 N. C. 519.

⁵³ See ch. X, sec. 174.

⁵⁴ See ch. X, sec. 175. *Powers v. Blue Grass, etc.*, (1898), 86 Fed. 705, at 709.

⁵⁵ See ch. X, sec. 176. *Johnson v. Farnum* (1876), 56 Ga. 144.

⁵⁶ See ch. X, sec. 177. *The Transatlantic Co. v. Pietonie* (1860), 1 Johns. (English Report) 604, 6 Jur. (N.S.) 532.

⁵⁷ See ch. X, sec. 178. *Harned v. Rowand* (1908), 69 Atl. 181, 74 N. J. Eq. 264.

⁵⁸ See ch. X, sec. 180. *Parsille v. Brown* (1915), 154 N. W. 569, 188 Mich. 485.

⁵⁹ See ch. X, sec. 181.

⁶⁰ See ch. X, sec. 179. *Bond-Reed Co. v. Walsh* (1911), 181 S. W. 248, Tex. Civ. App., December 8, 1915.

⁶¹ *Williams v. S. W. Smith Ins. Agency* (1915), 84 S. E. 235, 75 W. Va. 494.

^{61a} *United States v. Dominion Oil Co.* (1917), 241 Fed. 425.

CHAPTER VI

RECEIVERS OF ESTATES

ANALYSIS

INFANTS' ESTATES

- § 95. Chancery Jurisdiction and Receivers of Infants' Estates.
- § 96. Formerly No Receiver of Infants' Estates Except Suit Pending.
- § 97. Now Receiver of Infants' Estates by Petition Ex Parte.
- § 98. Chancery Jurisdiction and Receivers of Infants' Estates in United States.

LUNATICS' AND IDIOTS' ESTATES

- § 99. The King's and Chancellor's Jurisdiction over Lunatics and Idiots.
- § 100. Receivers of Estates of Lunatics and Idiots.
- § 101. Appointment of Receiver over Lunatics' and Idiots' Estates by Petition Ex Parte.
- § 102. Chancery Jurisdiction over Lunatics and Idiots in United States.
- § 103. Receivers of Estates of Lunatics and Idiots in United States.

DECEDENTS' ESTATES

- § 104. Receiver Generally to Protect Property of Deceased.
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INFANTS' ESTATES

§ 95. Chancery Jurisdiction and Receivers of Infants' Estates. The English chancery court acts for the protection of infants by virtue of a general right delegated by the crown as *pater patriae* to interfere for the benefit of persons incapable of protecting themselves.¹ That "the great seal" has the superintendency over all infants was held by Lord Chancellor Macclesfield in 1721.²

The guardian of an infant at common law did not have full power of control and management over the property of his ward.³ If the property of the ward was not in the hands of a trustee or trustees, it was often necessary to appoint a receiver to properly protect it.

The modern statutes of England and also the statutes of most states of the United States have enlarged the powers of guardians, giving them power over the estates of the ward, and so have made the appointment of receivers over the estates of infants generally unnecessary.

§ 96. Formerly No Receiver of Infants' Estates Except Suit Pending. Formerly a receiver could not be appointed over an infant's estate except a cause was pending.* This was carrying out the general rule that receivers are not ordinarily appointed except in an adversary suit. However, later on the court came to appoint receivers by petition *ex parte*, stating that certain property belonged to the infant and praying for a receiver of such property.⁵

§ 97. Now Receiver of Infants' Estates by Petition Ex Parte. Whatever uncertainty in England may have been entertained

¹ *Butler v. Freeman* (1756), 1 Amb. 301, at 302.

² *Beaufort v. Berty* (1721), 1 P. Wms. 702; *Coke on Litt.*, 88b, n. 16.

³ *Settled Land Act*, 1882, secs. 59, 60; *Settled Estate Act*, 1897; *Conveyancing Act*, 1881, sec. 41; *Settled Land Acts of England*, 1882 to 1890.

⁴ *Anon.* 1738, 1 Atk. 489, 578; *Ex parte Whitfield*, 2 Atk. 315; *Exr. of Mountfort*, 15 Ves. 445, n.

⁵ *In re Leeming and In re Gasgoyne*, 20 L. J. Ch. 550 (1851); see also *Leddel's Executor v. Starr*, 19 N. J. Eq. 159, at 163.

over the chancery court's jurisdiction to appoint a receiver of the estate of a minor upon petition was removed by Statutes 4 and 5 W. (1833) 4 ch. 78, sec. 7, which expressly authorizes such appointment.⁶ The more usual practice is now for the court to appoint a guardian of the person and estate who is required to enter into a recognizance with sureties like a receiver.⁷

Bills or petitions may be filed on behalf of minors, sometimes in the name of a friend (*prochein ami*) or relative, sometimes in the name of a stranger. The only inquiry which the court makes is whether or not the proceeding is for the benefit of the infant.⁸

§ 98. Chancery Jurisdiction and Receivers over Infants' Estates in United States. "The power of the court of equity to interfere with and control not only the estates but the persons and custody of all minors within the limits of the jurisdiction must exist in a republican form of government as well as in England. It is a duty which the country owes as well to itself as to the infant, to see that he is not abused, defrauded or neglected, and the infant has a right to this protection."⁹ However, in the United States this equity jurisdiction over infants is not of as much importance as it used to be in England, because in the United States, as well as in England today, by statutory law the persons and property of infants are generally put under the supervision of orphans' courts, surrogate courts, courts ordinary, or courts of probate, as they are called in England or the respective states. In some states, however, where the chancery courts as such still exist¹⁰ the jurisdiction still exists¹¹ and is exercised, and in some of those states such jurisdiction is

⁶ In re Goode (1850), Ir. Ch. Rep., Vol. 1, p. 256, at 260.

⁷ Halsbury's Laws of Eng., Vol. 24, p. 343.

⁸ In re Goode (1850), 1 Ir. Ch. Rep. 256, at 266.

⁹ Cows v. Cows, 3 Gilm. (Ill.) 435, at 437, A. Lincoln, counsel;

Williamson v. Berry, 8 How. 495, at 554, 12 L. ed. 1170; Ames v. Ames, 151 Ill. 280; McCord v. Ochiltree, 8 Blackf. 15.

¹⁰ New Jersey, for instance.

¹¹ See Liddell's Executor v. Starr (1868), 19 N. J. Eq. 159, at 163.

expressly conferred by statute upon the equity courts.¹² Even in the code states where the chancery courts as such have been abolished, equitable remedies have not been abolished or changed in substance. It would therefore seem that even in such states a court with general chancery powers could take jurisdiction over the person or estate of a minor or infant if the state had not in fact taken such power away from the courts having general chancery powers and given it to the probate courts or surrogate or by whatever name such court is called. By reason of the statutes entrusting the care of infants to probate courts or other courts, there are few cases in America wherein receivers have been appointed over the estate of minors, but such cases may be found.¹³

LUNATICS' AND IDIOTS' ESTATES

§ 99. The King's and Chancellor's Jurisdiction over Lunatics and Idiots. There was a distinction between the authority of the king over the lands of a lunatic and the lands of an idiot. An idiot is one who hath had no "understanding from the nativity and therefore is by law presumed never likely to attain any."¹⁴ "A lunatic is a person who hath had understanding but by disease, grief, or other accident hath lost the use of his reason or has become non compos mentis, that is, of mind so unsound as to be incapable of conducting himself or his affairs."¹⁵ The common law, aided by the statutes vested in the king, the profits of the land of an idiot during the idiot's life as a beneficial interest, and in the case of lunatics the law imposed upon the king the duty of keeping the lands and tenements without waste.¹⁶ In the case of a lunatic's lands the king had an active duty to perform. The king could grant the custody of an idiot and the rents and profits of the

¹² Mississippi Code (1892), sec. 2186, *Stewart v. Morrison*, 38 Miss. 417.

¹³ *Skinner v. Maxwell*, 66 N. C. 48.

¹⁴ Stephens, *Common Law of England*, Vol. 2, p. 582.

¹⁵ Stephens, *Common Law of England*, Vol. 2, p. 583.

¹⁶ *Statutes of England*, 17 Ed. II, ch. 9, 17 Ed. II, ch. 10.

idiot's land to the chancellor because being *parens patriae* he had such custody.¹⁷ The king was in a sense a trustee for the lunatic's estate and was in a sense a life tenant of the idiot's estate.

§ 100. Receivers of Estates of Lunatics and Idiots. The chancellor's power in the matter of idiots and lunatics was originally by reason of what was called a sign manual of the king empowering the keeper of the great seal to take care of such persons and of their estates, in the right of the crown.¹⁸ The court of wardship was erected sometime before 1743 and the jurisdiction over lunatics taken from the chancery court, but at that date or sometime before it reverted back to the chancery court. However, by 1772, the origin of the power of the chancellor over idiots and lunatics became a matter of curiosity rather than use, and the great seal or the chancery court came to act in such matters not under the sign manual but by virtue of its general power, as keeper of the king's conscience.¹⁹

§ 101. Appointment of Receivers over Lunatics' and Idiots' Estates by Petition Ex Parte. The jurisdiction of the English court of chancery over lunatics and idiots is not exercised in a regular adversary suit, but by petition to the chancellor²⁰ and an appeal from his orders was to the king in council and not to the House of Lords.²¹ The theory of this appeal is that the chancellor in making orders in relation to lunatics acts for the time being not as a chancellor or keeper of the great seal but by the authority of the sign manual of the king, and as *parens patriae*, under the particular power and jurisdiction,

¹⁷ *Corporation of Burford v. Leuthall*, 2 P. Wms. 553.

¹⁸ *Sheldon v. Fortesque* (1731), 3 P. Wms. 104.

¹⁹ *Ex parte Grimstone*, 2 Amb. 706.

²⁰ *Receiver of Lunatic, Ex parte Radcliffe* (1820), 1 J. & W. 639; *Ex parte Warren* (1805), 10 Ves. 622; see *In re Ferrior* (1867), L. R. 3 Ch. App. 175, at 178.

²¹ *Sheldon v. Fortesque* (1731), 3 P. Wms. 104.

is only accountable to the king in council. It would seem, however, since the case of *Ex parte Grimstone*, in 1772, an appeal would lie to the appellate court as in other chancery cases.

§ 102. Chancery Jurisdiction over Lunatics and Idiots in United States. In the early history of our country before the states by special statute entrusted the care of lunatics and idiots to special tribunals, chancery courts had jurisdiction over them.²² In some of our states even today chancery courts have been given jurisdiction over the care of the persons and estates of idiots and lunatics by special statute.²³ When this is so there are generally statutory provisions, pointing out how jurisdiction is obtained and giving methods of procedure. The procedure whether adopted by chancery courts or by special tribunals is generally borrowed from the practice which grew up before the English chancery court.

§ 103. Receiver of Estates of Lunatics and Idiots in United States. Some states provide by special statute for the appointment of a receiver over the estate of one insane when no suitable person will act as guardian.²⁴

If after inquest to determine the sanity or insanity of a person or any other similar proceeding by a chancery court, there is danger of the property being dissipated or lost before a proper committee or guardian can be appointed, then the court can appoint a receiver.²⁵

The jurisdiction of chancery in lunacy remains after the death of the lunatic only to the extent and for the purpose of having the necessary accounts taken and directing the fund or estate to be paid over to the party or parties entitled.²⁶

²² *Malin v. Malin* (1816), 2 Johns. Ch. 237.

²³ In the *Matter of Rachel Colvin* (1851), 3 Md. Ch. 278, at 282.

²⁴ Code of North Carolina, sec. 1676; see *In re Hybart*, 119 N. C. 359, at 360, 25 S. E. 963.

²⁵ In the *Matter of Kenton*, 5 Binn. (Pa.) 613.

²⁶ In the *Matter of Rachel Colvin*, 3 Md. 278; see also *In re Ferrior* (1867), L. R. 3 Ch. App. 175.

DECEDENTS' ESTATES

§ 104. Receiver Generally to Protect Property of Deceased.

After the death of an intestate or a testator there is no one to hold the personal property until an administrator or executor is appointed by a duly authorized court. Until a will is properly admitted to probate, or it is shown there is no will, there is no certainty as to who owns the real estate devised or not devised. Therefore, when there is danger of the loss, misuse, or misapplication of the personal property, or the rents and profits of the real estate or even of the real estate itself a chancery court will appoint a receiver of such property left by the decedent as is in such danger unless the statutes empower the courts of probate to properly and adequately take charge of such property and it is shown that such property is or will be properly taken care of by the temporary administrator or by some other proper person.²⁷ The probate courts, surrogate courts, courts ordinary and orphans' courts now generally have power by statute to appoint an administrator ad litem who accomplishes for the property what a receiver formerly would do.²⁸

In England as early as 1857 was passed "An act to amend the law relating to probate and letters of administration giving the court of probate power to appoint a receiver of the real estate of any deceased person pending any suit in the court touching the validity of any will of such deceased person by which his real estate may be affected."²⁹

The collection of the estate pending granting of letters was provided for in New York State as early as 1837.³⁰

²⁷ *In re Parker* (1885), 54 L. J. Ch. 604 (appointment under Judicature Act of 1873; *In re Wenge* (1911), W. N. 129; *Attorney General v. Clavin* (1907), 72 N. J. Eq. 642, 66 Atl. 599; see cases discussed; *Buchanan v. Buchanan* (1909), 75 N. J. Eq. 274, 71 Atl. 745, 22 L. R. A. (N.S.) 454; *Flagler v. Blunt*, 32 N. J. Eq. 518; *Hansford v. Elliott*, 9 Leigh 79.

²⁸ *In re Curtis' Estate v. Piersol* (1912), 117 Md. 170, 83 Atl. 87; see *Joyce v. Ragan* (1911), 117 Md. 38, 82 Atl. 992, where receiver of estate was not allowed.

²⁹ 20 and 21 Vic. 1857, ch. 77, par. 71.

³⁰ New York Statutes, 1837, sec. 23 (3 R. S. 160, par. 38); see *Crandall v. Shaw* (1874), 2 Redf. (N. Y.) 100; *Mootrie v. Hunt* (1857), 4 Bradf. (N. Y.) 173.

§ 105. English Chancery Court Appoints Receiver to Protect Property of Deceased. It was held by Lord Eldon, as early as 1801, in a leading case³¹ that a court of equity has jurisdiction to protect the property of a testator, or intestate, by appointing a receiver pending a litigation in the ecclesiastical court of probate or administration, notwithstanding the power of such court to grant an administration pendente lite.³² No one is in actual lawful enjoyment of property so circumstanced and no wrong can be done to any one by taking and preserving it for the benefit of the successful litigant.³³ If there is a legal title to receive the court ought not to appoint a receiver.³⁴ The court of equity appoints the receiver on the theory that it will do its best to collect the effects and that the property is in danger in this case that it may get into the hands of persons who have nothing to do with it, and a receiver in such cases is appointed almost as a matter of course.³⁵ Such receiver may even be appointed to carry on the business of the estate.³⁶

In England it was held as far back as 1806³⁷ that "The chancery court of England exercises concurrent jurisdiction with the spiritual court, upon the principle that executors and administrators are trustees and in that character come under the control of the chancery court by its ordinary jurisdiction. The administration is, therefore, not upon slight grounds to be taken from the executor."

In 1888 an application was made to the probate division of the English high court of justice by a coexecutor for the

³¹ *King v. King* (1801), 6 Ves. 172; *Owens v. Homan* (1853), 4 H. of L. cases, 997, at 1031.

³² *Atkinson v. Henshaw*, 2 Ves. & Bea. 85; *Grimston v. Turner* (1870), 22 L. T. (N.S.) 292; *Ball v. Oliver*, 2 Ves. & Bea. 96; *Blackett v. Blackett* (1871), 24 L. T. (N.S.) 276.

³³ *Watkins v. Brent* (1835), 1 M. & C. 102; *Anderson v. Guichard* (1851), 9 Hare 275.

³⁴ *Blackett v. Blackett*, 19 W. R. 559; *Devey v. Thornton* (1851), 9 Hare 229; *In re Wright*, 32 Sol. J. 721.

³⁵ *In re Parker* (1885), 54 L. J. Ch. 694; *In re Wenge* (1911), 1911 W. Notes, 129 (Ch. Div.); *Owens v. Homan* (1853), 4 H. of L. Cases, 997, at 1031.

³⁶ *Devey v. Thornton*, 9 Hare 229.

³⁷ *Middletown v. Dodswell* (1806), 13 Ves. 266, at 269.

appointment of a receiver of the estate of the deceased, because the other coexecutor before obtaining probate and without consent of his coexecutor took possession of certain assets of the deceased and made preparations to sell them. The court allowed an injunction and appointed a receiver.³⁸

In general in England and in America the application to secure the rights of parties against the mismanagement of estates by fiduciaries appointed by the courts of ordinary or orphans' courts or probate courts should be made to that court and it is only in extraordinary circumstances that equity will interfere.³⁹ Most probate courts have power to compel fiduciaries of estates to give bond.

§ 106. English Ecclesiastical Courts Formerly Appointed Administrator Pendente Lite. The ecclesiastical court had power to appoint an administrator pendente lite as early as 1731,⁴⁰ nevertheless when cases were presented to the chancery court wherein an administrator pendente lite could not properly preserve the property or could not be appointed in time to preserve the property, then a receiver was appointed.⁴¹ Under these old cases and the law then in force, an administrator pendente lite did not have full powers.

§ 107. English Probate Court Appoints Administrator Pendente Lite of Personal Property and Receiver of Real Estate. The English Probate Act of 1857⁴² abolished the testamentary jurisdiction of the ecclesiastical courts and established a court of probate. Under the seventieth section of this act, the court of probate was authorized pending any suit touching the validity of a will or for obtaining, recalling or revoking any probate or grant of administration of the personal estate of the deceased, to appoint an administrator pendente lite who

³⁸ In the Case of William Moore (1888), 57 L. J. Pro 37.

³⁹ Hill v. Arnold, 79 Ga. 367, 4 S. E. 751; Crawford v. Wilson (1913), 139 Ga. 654, at 663, 78 S. E. 30.

⁴⁰ Walker v. Woollaston, 2 P. Wms. 516.

⁴¹ Atkinson v. Henshaw, 2 Ves. & Bea. 85; Ball v. Oliver, 2 Ves. & Bea. 96.

⁴² 20 and 21 Vic., ch. 77.

should have all the rights and powers of a general administrator except the right of distributing the residue of such personal estate.⁴³

Under the seventy-first section of the act the court of probate was authorized pending a suit touching the validity of a will affecting the real estate of the deceased to appoint a receiver of the real estate of such deceased person, such receiver to have power to receive the rents and profits of the real estate and to let and manage the same.⁴⁴

A stronger case⁴⁵ must be made out to entitle the chancery court to appoint a receiver now than before the Probate Act of 1857. Where the power in the probate court has not been exercised the chancery court will appoint a receiver of the personalty and also of the rents and profits of real estate even though defendant is in possession.⁴⁶

§ 108. United States and State Chancery Jurisdiction to Preserve Property of Deceased. It is among the undoubted powers of a chancery court to preserve the property of a decedent to those who may be entitled to it under such circumstances. If it had not such power there would be a failure of justice.⁴⁷

In the United States generally courts of equity have concurrent jurisdiction with courts of ordinary or probate courts in the administration of the estates of deceased persons in all cases where equitable interference is necessary or proper for the protection of the rights of the parties in interest.⁴⁸ But a receiver should not be appointed to take the assets out of the hands of the legally appointed representatives except

⁴³ See also 21 and 22 Vic., ch. 95, sec. 21.

⁴⁴ See Sir R. Malins, V. C., in *Veret v. Duprez*, L. R. 6 Eq. 329, at 331.

⁴⁵ *Hitchen v. Birks* (1870), L. R. 10 Eq. 471, at 475.

⁴⁶ *Parkin v. Seddons* (1873), L. R. 16 Eq. 34, at 36.

⁴⁷ *Flagler v. Blunt*, 32 N. J. Eq. 522; *Attorney General v. Clavin*, 72 N. J. Eq. 642, 66 Atl. 599; *Buskirk Bros. v. Peck*, 57 W. Va. 360, 50 S. E. 432.

⁴⁸ *West v. Mercer*, 130 Ga. 357, at 360, 60 S. E. 859.

in cases of manifest danger of loss or destruction or material injury to the assets,⁴⁹ and in matters of accounting.⁵⁰

Courts of equity may furnish a more comprehensive remedy for they may proceed by injunction to restrain the further proceeding of executors until an account be taken if there is danger of injury to the estate.⁵¹

Where property both real and personal is left by a testator or intestate and such property is alleged to be in the unlawful possession of the defendant and held adversely to the complainant and there is a dispute concerning who is entitled to the property, the court will sometimes appoint a receiver to manage the estate and assets of the decedent regardless of the solvency of the defendant.⁵²

§ 109. United States Courts May at Times Appoint Receiver of Estates. The circuit courts of the United States were, from their original grant of authority, invested with all the then exercised powers of the courts of chancery in England, so far as they had application to our political system. One branch of the English chancery jurisdiction was the administration of estates. The ecclesiastical courts in that country had very limited powers in such matters. The jealousy with which they had been regarded had kept them shorn of authority to do many things necessary to a complete administration, marshaling and distribution of assets. Some points of authority had been gained and others equally essential to any systematic jurisdiction had not. What were possessed were crude and imperfect. The consequence was that the court of chancery exercised its powers and applied its doctrines in administering estates. As soon as the representative of an estate was appointed, he was regarded as charged with a trust. This brought him under the familiar doctrine within the

⁴⁹ Dougherty v. McDougald, 10 Ga. 121; Powell v. Quinn, 49 Ga. 523; Harrup v. Winolet, 37 Ga. 655.

⁵⁰ Rogers v. King, 8 Paige 210.

⁵¹ Wood v. Brown (1866), 34 N. Y. 337, at 345.

⁵² Robinson v. Taylor, 42 Fed. 803.

control of that court. The ecclesiastical courts had no power to deal with trusts. The examination and settling of accounts was often necessary. This again the ecclesiastical courts could not do, but it was peculiarly a province of the court of chancery. The ecclesiastical court could not marshal and distribute assets. The court of chancery had ample power to do this.⁵³

The jurisdiction of the courts of equity of the United States does not of course extend to the appointment of administrator or the confirmation of executors' accounts, nor the matters made necessary by the state law for the investiture of the trust, including in such the probate of the will if that is required by the local law to give it validity.

A circuit court of the United States has no jurisdiction in a purely probate proceeding which is not a matter of equitable cognizance nor has it power to undertake the general administration of estates of a deceased person, but it may as a court of equity, in a suit where it has jurisdiction of the parties, appoint a receiver of an estate pending the probate of a will, in the absence of the appointment of a custodian by the probate court.⁵⁴

§ 110. State Chancery or Equity Courts May Sometimes Appoint Receiver of Estate. As the federal courts of the United States were constituted along the lines of the chancery courts of England and adopted the rules and usages of equity as obtained in England, so did the state chancery courts and so did our state courts which combined chancery and equity jurisdiction.

It is among the undoubted powers of a court having equity jurisdiction to preserve the property of a decedent to those

⁵³ Circuit courts of the United States can not be divested or impaired of their jurisdiction by state

legislation. *Severens, J., in Ball v. Tompkins*, 41 Fed. 489.

⁵⁴ *Underground Elect. Ry. v. Owlsley*, 176 Fed. 26.

who may be entitled to it. If it had not such power there would be in certain cases a failure of justice.⁵⁵

During the litigation concerning the admission of a will to probate, and during the interval before an executor or administrator is appointed, a court of equity has power to appoint a receiver of the personal property and of the rents and profits of the real estate, where there is danger of their loss, misuse or misapplication.⁵⁶

Creditors or next of kin may appeal to the equitable jurisdiction of the court to conserve the property.⁵⁷

Few cases are found in the American state reports where a receiver of the estate of a deceased has been appointed. The reason is not that a court of equity has not power to so appoint in certain cases, but because state statutes generally provide very specifically for temporary administrators, and full power of administration by permanent administrators and for guardians, etc.

§ 111. Jurisdiction of Courts of Equity and Probate in States. In this country the laws of the several states determine the succession of the property of persons dying

⁵⁵ *Hansford v. Elliott*, 9 Leigh 79; *Flagler v. Blunt* (1880), 32 N. J. Eq. 518, at 522; see *Matter of Hancock* (1882), 27 Hun 576; *McCarter v. Clavin* (1907), 72 N. J. Eq. 642, 66 Atl. 599; no receiver appointed in *Buchanan v. Buchanan*, 75 N. J. 274, at 283, 71 Atl. 745, 22 L. R. A. (N.S.) 454.

⁵⁶ *Attorney General v. Clavin* (1907), 72 N. J. Eq. 642, at 644, 66 Atl. 599; *Buchanan v. Buchanan* (1908), 75 N. J. Eq. 274, at 283, 71 Atl. 745; in the *Matter of Rachel Colvin* (1851), 3 Md. Ch. 278.

⁵⁷ *Buchanan v. Buchanan* (1908), 75 N. J. Eq. 274, at 283, 71 Atl. 745; *Flagler v. Blunt* (1880), 32 N. J. Eq. 518; see *Hansford v. Elliott* (1837), 9 Leigh (Va.) 79. When legatees were allowed an

injunction to prevent irreparable mischief before administration.

In *Rice v. Tonnele* (1847), 4 Sandf., ch. 568, when a chancery court said it would make an order appointing a receiver to receive quarterly certain sums from those in possession of an estate, such receiver to pay to an infant his maintenance, because, said the court, the infant in that case was entitled in any event to the support she seeks by her bill in equity.

In *Lewis v. Campan* (1866), 14 Mich. 458, a bill was filed in the appellate court in aid of the appeal proceedings asking that a receiver take entire charge of the property in the hands of an administrator until the question of his removal was finally determined upon by the appellate court.

intestate and provide for the probate and establishment of wills. Statutes confer upon various tribunals jurisdiction over probate proceedings. The courts in exercising the powers conferred exercise statutory and not equitable powers. In the second place courts of equity will not entertain jurisdiction over probate proceedings because they are in the nature of proceedings in rem.⁵⁸

It is elementary that probate proceedings by which jurisdiction of a probate court is asserted over the estate of a decedent for the purpose of administering the same is in the nature of a proceeding in rem and is, therefore, one as to which all the world is charged with notice.⁵⁹

The jurisdiction of a court of probate differs from that of other civil tribunals in this, that its province is not to ascertain and enforce the rights of property, but to establish, preserve and perpetuate some important monument of title.⁶⁰ The probate court of England can do nothing to compel payment of debts.⁶¹

§ 112. Limitation of Jurisdiction of State Probate Courts.

The probate courts, surrogate courts, orphans' courts, or by whatever name they are called in each particular state, are organized on substantially the same basis as the probate court of Michigan, whose powers are described as follows: "There can be no doubt that the probate courts of Michigan are all clothed with authority, by the laws of the state to hear and determine all questions arising in the ordinary course of administration and distribution of estates. It has obviously been the policy of the state to distribute the judicial power in such a way as to produce this result. But it is also clear that it was foreseen and expected that questions would arise which would require

⁵⁸ *Underground Elect. Ry. v. Ow-
sley*, 176 Fed. 26, at 30; see *Garzot
v. de Rubio* (1907), 209 U. S. 283,
52 L. ed. 794; *Goodrich v. Ferris*
(1908), 214 U. S. 71, at 80, 53 L.
ed. 914.

⁵⁹ *Goodrich v. Ferris*, 214 U. S.
71, at 80, 53 L. ed. 914.

⁶⁰ *Coalters v. Bryan*, 1 Gratt.
(Va.) 18, at 76.

⁶¹ *Tichborne* (1869), L. R. 1 Pro.
& Div. 733.

the exercise of the jurisdiction of a court having ampler powers for inquiry and redress than the probate court is invested with. The state court of chancery has concurrent jurisdiction in respect to some of the matters with which the probate court is authorized to deal; and it stands in waiting to help out the weaker tribunal by taking cognizance of cases and questions when there is no adequate remedy in the probate court."⁶²

The state may confer jurisdiction in the matter of estates upon courts of its own creation as has been universally done in all the states by the establishment of some kind of probate court, by whatsoever name called. And thus in the same territory are state courts of probate and chancery courts with some concurrent jurisdiction over the same subject.

A creditor can not transfer the settlement of an estate from probate court to court of chancery.⁶³ However, the representative of an estate may be so situated with reference to interests sought to be converted into assets that a creditor may invoke the aid of a court of equity to control such interests and place them in the hands of such representative to be administered, but equity will go no further and leave the settlement of the estate to the probate court. Jurisdiction conferred on the probate court is exclusive in all respects in which it is adequate.⁶⁴

The reserve power of the chancery court over estates in Alabama is shown as follows: "The court of probate had, by the constitution, a general jurisdiction over the grant of letters testamentary, and of administration, in which is involved the power of revocation. The grant may be revoked whenever gross misconduct is shown, or whenever a necessity exists additional security may be required. Protection against loss to creditors, legatees, or next of kin, and security for a

⁶² Ball v. Tompkins, 41 Fed. 489.

⁶³ McDonald v. Aten (1853), 1 O. S. 293.

⁶⁴ Saylor v. Simpson, 45 O. S. 141, 12 N. E. 181; Havens v. Horton, 53 O. S. 342, 41 N. E. 253; Mercer v. Cunningham, 53 O. S. 353, at 361, 41 N. E. 788.

faithful administration, are within the power of the parties and the competency of that court.⁶⁵ There can but seldom be a necessity for the exercise of any other preventative or protective remedy than such as that court can afford, and hence though a court of equity has the jurisdiction to appoint a receiver of the assets, practically taking the administration into its hands, the jurisdiction is not exercised unless there is manifest danger of loss which may be irreparable.”⁶⁶

§ 113. No Receiver by Way of Equitable Execution against Estates. A receivership in the nature of an equitable execution against a freehold can not be had *ex parte* against the estate of a dead man to enforce a judgment against such dead man. If execution is issued at all it must be against the dead man's heir or devisee and under such circumstances as the court has jurisdiction over the heir or devisee. It is against all principle to proceed against the heir or devisee until he has been brought before the court.⁶⁷ In a suit by a creditor against the administratrix, a receiver has been appointed by the court to preserve the estate between the time of death of administrator and the appointment by the court of an administrator *de bonis non*, such appointment taking some time to secure.⁶⁸

The appointment of a receiver in America over estates of deceased persons is quite rare; however, we find a few cases. It has been held in Virginia⁶⁹ “that in a creditor's suit against the administrator, it seems fit and proper that the court should have power to call in the assets, from the hands of a personal representative, a decree in such a suit puts an end to the power of the personal representative to administer the assets,

⁶⁵ *Joseph v. Herzig* (1909), 115 N. Y. S. 330.

⁶⁶ *Randle v. Carter*, 67 Ala. 95, at 103.

⁶⁷ *In re Shephard-Atkins v. Shephard*, 43 Ch. D. 131, at 137.

⁶⁸ *In re Parker* (1879), 12 Ch. 293.

⁶⁹ *Farmer v. Yates and Wife*, 23 Gratt. 145; *Davis v. Chapman*, 83 Va. 67, at 74, 1 S. E. 472.

and operates as an injunction of all suits against him by the individual creditors of the estate."

§ 114. When Receiver of Estate Should Be Discharged.

As soon as the court of chancery finds anyone clothed by the court of probate with the character of an administrator, even though he is only appointed *pendente lite*, it will discharge the order for a receiver, and will allow the administrator to receive the estate, but it will hold its hand over his dealings with it and make such orders upon him as it may think proper.⁷⁰

§ 115. Frame of Bill for Receiver against Estate of Deceased. The bill for a receiver of the state of one deceased shall be framed "as a bill to obtain a receiver for the interim protection of the property until a legal personal representative was duly constituted."⁷¹

⁷⁰ *Tichbone v. Tichbone* (1869),
L. R. 1 Pr. & Div. 733.

⁷¹ *Nothard v. Proctor* (1875), 1
Ch. 4, at 7.

CHAPTER VII

RECEIVERS BETWEEN PARTNERS, CO-TENANTS, ETC.

ANALYSIS

PARTNERSHIPS

- § 116. Receivers in Partnership Cases Generally.
- § 117. Receiver of Partnership without Dissolution Rare.
- § 118. Receiver when Partnership Subsisting.
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 - (a) English Doctrine Not a Matter of Course.
 - (b) American Doctrine a Matter of Course.
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- § 121. Receiver of Partnership Having Arbitration Agreement.

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PARTNERSHIPS

§ 116. **Receiver in Partnership Cases Generally.** It is well-settled law that a partnership can not, in an action at law, sue another partner for the recovery of money or property advanced by the firm, and vice versa. The inability of a firm to sue one of its members, and vice versa, arose from the circumstances that, in an action by a firm against one of its members, and vice versa, the member in question must be both plaintiff and a defendant.¹ Today a court of equity will not allow a partner to derive advantage from his own misconduct by compelling his copartner to submit either to a continued

¹ Thompson v. Steamboat, 2 O. S. 31.

wrong or a dissolution, but, rather than permit an improper advantage to be taken of a rule designed to operate for the benefit of all parties, courts will interfere in modern times where formerly they would have declined to do so.²

At the same time, with few exceptions,³ courts hesitate to take the management of a going concern into their own hands, and if they can not usefully interfere in any other manner, they will generally not interfere at all, unless for the purpose of winding up the partnership,⁴ and distributing the assets.⁵

If the court should take the management of a partnership into its own hands at the slightest dissatisfaction and disagreement of a partner without ultimately winding up the concern "then it might be called upon to make itself manager of every trade in the kingdom."⁶

If the court does take the management out of the hands of the partners for the purpose of winding up the partnership, it must do so by the appointment of a receiver to manage it under the orders of the court.

The purpose of the appointment is to place the assets in the control of a disinterested person to be disposed of to the best advantage of the members and creditors of the firm so that their rights in the fund may be secured as they may be made to appear.⁷

Ordinarily a receiver of the effects of a partnership will not be appointed unless the bill prays for a dissolution and shows a proper case for the same,⁸ for it will destroy the trade.⁹

The ordinary equitable actions allowed between partners are, viz.: (1) An action for accounting. (2) An action for accounting and dissolution.

² *Lyles v. Williams* (1914), 97 S. C. 373, 81 S. E. 659; *Title Ins. Co. v. Grider* (1908), 152 Cal. 746, 94 Pac. 601.

³ *Const. v. Harris* (1824), Tur. & Rus. (Eng.) 496, at 517.

⁴ *Lindlay on Partnership*, Vol. 3, ch. 10, sec. 3.

⁵ *Waters v. Taylor* (1807), 15 Ves. 13.

⁶ *Goodman v. Whitcomb* (1820), 1 J. & W. 592.

⁷ *McGrath v. Cowen*, 57 O. S. 385, 49 N. E. 338.

⁸ *Goodman v. Whitcomb*, 1 J. & W. 589.

⁹ *Oliver v. Hamilton*, 2 Anst. 453.

In a suit for an accounting and dissolution to entitle a party to a receiver, it must be shown that the partnership is insolvent¹⁰ or that the party in possession is acting in bad faith with the property of the partnership,¹¹ exclusion of one partner,¹² or some reason which is, according to the "usages of equity," sufficient to justify the court in making the appointment.

Relief may be had by one partner against another by an injunction restraining one partner or partners from continuing to act in the way complained of.¹³ Such an injunction does not amount to taking the management of the partnership out of the hands of the partners and committing it to the court. However, when cases arise that there is danger of the property being wasted or destroyed if left in the hands of the partner or partners during the litigation, then under certain circumstances the court will appoint a receiver.

Upon application to the court for a receiver, the court is placed in a very difficult position. When it appoints a receiver it puts an end to the partnership which one or more partners as a rule want continued, and on motion, and before final hearing, the court by appointing a receiver at times destroyed a valuable asset, namely the partnership and all that means, exclusive of the material and tangible assets. On the other hand, if the court does not appoint a receiver greater loss may accrue to the plaintiff and sometimes to the defendant himself.¹⁴

§ 117. Receiver of Partnership without Dissolution Rare. Lord Eldon said: "The court would never take any partnership concern into its own hands by a receiver and much less by a manager, unless the suit was so framed, as that a decree

¹⁰ *Kell v. Murdock*, 4 Ohio N. P. 247, at 248; *Brooke v. Tucker* (1907), 43 So. 141.

¹¹ *Saylor v. Mockbri*, 9 Ia. 210.

¹² *Gillett v. Higgins*, 142 Ala. 444, 38 So. 664; *Emsten v. Schnebly*, 89 Fed. 540; *Wolbert v. Harris*, 7 N. J. Eq. 621; *Whitman v. Robinson*, 21 Md. 43.

¹³ *Hall v. Hall* (1850), 3 MacN. & G., 79, at 86.

¹⁴ *Madgwick v. Wimble* (1843), 6 Beav. 500; *Blakeney v. Dufaur* (1851), 15 Beav. 40, at 42; *Sargeant v. Read*, 1 Ch. D. 600.

could be made at the hearing, either that the concern should be carried on according to the terms of some instrument, which by the agreement between the parties was to regulate the mode of its being carried on, or that it should be wholly put an end to.”¹⁵

§ 118. Receiver when Partnership Subsisting. In the case of a subsisting partnership the court will never interfere by appointing a receiver unless for such gross abuse and misconduct on the part of one partner as that a dissolution ought to be decreed, and the affairs of the concern wound up, for otherwise as observed in one of the cases, the court might make itself the manager of every trade in the kingdom.¹⁶

§ 119. Receiver in Partnership after Dissolution. (a) English Doctrine Not a Matter of Course. Lord Eldon said: “I have frequently disavowed as a principle of this court that a receiver is to be appointed merely on the ground of a dissolution of partnership. There must be some breach of duty of a partner, or of the contract of partnership. In this instance the defendants have been carrying on trade on their own account with the partnership effects.”¹⁷

If one partner has a right to consider the partnership as at an end, it may continue for the purpose of winding up the affairs; but being by death, or notice or any other mode of determination actually ended, no person in possession of the property can make any use of it inconsistent with that purpose.¹⁸

If any of the partners seek to exclude another from taking that part in the concern which he is entitled to, the court will grant a receiver, so in the course of winding up the affairs

¹⁵ *Const. v. Harris* (1824), *Tur. & Rus.* 496, at 514.

¹⁶ *Goodman v. Whitcomb* (1820), 1 *Jac. & W.* 592.

¹⁷ *Harding v. Glover* (1810), 18 *Ves.* 280.

¹⁸ *Crawshay v. Maule* (1818), 1 *Swans.* 507.

after the determination of the partnership, the court, if necessary, interferes on the same principle.¹⁹

(b) **American Doctrine a Matter of Course.** As a general rule, each partner has an equal right to the possession of the partnership effects and to collect and apply them in satisfaction of the debts of the firm. Where either party has a right to dissolve the partnership and the agreement between the partners makes no provision for closing up the concern, it was a matter of course to appoint a manager or receiver on a bill filed for that purpose if they could not arrange the matter between themselves.²⁰ When it is necessary to preserve the good will of the business, the receiver may be directed to carry it on under the direction of the court until a sale is made.²¹

When a partnership is formed for a definite time, which has not expired, the court will not decree a dissolution except under special circumstances; neither will it where circumstances render a dissolution inconvenient, as when a large operation has been commenced which can not be arrested without serious loss. But when the court does grant a dissolution, it will appoint a receiver upon a disagreement between the partners in the course of the winding up; and the same rule must apply where a dissolution has taken place by consent or otherwise, and a serious disagreement arises afterward.²²

§ 120. Receiver of Partnership as against Surviving Partner.

The appointment of a receiver in a suit between the representative of a deceased partner and the surviving partner is not a matter of course,²³ as is the appointment between living partners. It is more like the rule formerly recognized in the English chancery courts when a receiver in partnership

¹⁹ *Wilson v. Greenwood* (1818), 1 Swans. 481.

²⁰ *Law v. Ford* (1830), 2 Paige 310; *Patterson v. Patterson* (1910), 184 Fed. 547.

²¹ *Martin v. Van Schaick* (1824), 4 Paige 478; see *Whitlock Cordage Co. v. Hine* (1915), 125 Md. 96, 93 Atl. 431.

²² *Richards v. Baurman* (1871), 65 N. C. 161, at 165; *Speights v. Peters*, 9 Gill. (Md.) 472, at 476; *Garretson v. Weaver*, 3 Ed. Ch. (N. Y.) 385.

²³ *Harding v. Glover*, 18 Ves. 281.

cases was not appointed merely on the ground of dissolution, but there must be some branch of duty of a partner or of the contract of partnership.²⁴

As for instance, the defendant surviving partner was trading on his own account with the debtors of the partnership and forebore to collect the debts from them due the partnership. A receiver was appointed of the partnership assets.²⁵

Two partners on the termination of their partnership came to an agreement for mutual convenience, that a third person should collect the outstanding assets; it was acted upon for some time and then one of the partners died. Held that the surviving partner could not repudiate the agreement and alone collect the debts, but that the executors of the deceased partner had a right to have a receiver appointed.²⁶

§ 121. Receiver of Partnership Having Arbitration Agreement. In England ²⁷ and most of our states we find statutes providing how differences may by contract or otherwise be submitted to arbitration. And the English acts ²⁸ contain a provision to the effect that if any party commences legal proceedings any party to such proceedings may apply to the court to stay such proceedings. In such a case if it is found to be desirable for the protection of the property which is the subject of the contract that a receiver should be appointed or an injunction granted, it is competent for the court to appoint a receiver or grant an injunction and by the same order to stay all further proceedings in the action except for the purpose of carrying out the order for a receiver or an injunction, with a view to a reference or arbitration. If the arbitration is along legal lines, the court has ample power to say that the matters in question ought to go to arbitration as the parties have agreed but that pending the arbitration a receiver should be appointed

²⁴ Phillip v. Atkinson (1787), 2 Bro. Ch. R. 272; Walker v. House (1848), 4 Md. Ch. D. 39.

²⁵ Estwick v. Conningsly, 1 Vern. 118.

²⁶ Davis v. Amer. (1854), 3 Drew 64.

²⁷ Acts of 1889, ch. 49, Stats. 52 and 53 Vic.

²⁸ Art. 4 of Acts of 1889, ch. 49, Stats. 52 and 53 Vic.

or an injunction granted for the purpose of protecting the property. After the reference to arbitration and pending the arbitration circumstances may arise which might make it necessary to protect the property, in which case it would seem an application for a receiver would be heard.²⁹ If the parties have proceeded with the arbitration without any reference to a court, and circumstances arise making it necessary to have a receiver appointed to care for the property, it would seem the proper practice for the party seeking to protect the property to bring a suit against the other party to the arbitration agreement, setting up the fact that both parties have already agreed to the arbitration, but that the other party fails to live up to the agreement or properly protect the property. Some relief should be asked for in order that an actual suit should be pending upon which to predicate a receivership.

TENANTS IN COMMON

§ 122. Ordinarily No Receiver of Property Held in Joint Tenancy. Gray, J., of Massachusetts,³⁰ said: "It is of the very essence of a ténancy in common that the tenants have each and equally the right to occupy the property and take the profits. One tenant in common of personal chattels, therefore, is not liable to be sued by the other for taking or retaining possession thereof, unless his dealing with them is such as to amount to a conversion, in which case he is liable to an action of tort in the nature of trover.³¹ *Weld v. Oliver*, 21 Pick. 559; *Delaney v. Rook*, 99 Mass. 546. And he is not bound to pay his co-tenant any compensation for the use of the common property, nor to account for the profits, unless he has received more than his just proportion, in which event he is liable to an action of contract in the nature of an implied assumpsit. The bill can not be maintained for a sale and division of the chattels, because it does not show that they

²⁹ *Compagnie du Senegal v. Woods* (1883), L. J. (Ch.) 166; *Plews v. Baker* (1873), L. R. 16 Eq. 564; *Pini v. Roncoroni* (1892), 1 Ch. 633.

³⁰ *Blood v. Blood* (1872), 110 Mass. 547.

³¹ *Weld v. Oliver* (1839), 21 Pick. 559; *Delaney v. Root* (1868), 99 Mass. 546.

were agreed to be or were used in carrying on any business for the joint benefit of the parties as partners or otherwise, or that the tenancy in common was of such a character as to require or contemplate a sale of the chattels or termination of the tenancy except by the consent of the parties; or that, by reason of the death or insolvency of either, a sale and division of the property was necessary or expedient for the purpose of settling his estate.³²

§ 123. Receiver for Joint Mining Property and Joint Funds.

A receiver has been appointed to take possession of a mining property, although the persons interested in it are not partners, when there are a number of joint proprietors who can not agree as to the working of the mines or the disposition of the property.³³ Also, when a common or joint fund is in danger of being lost or dissipated by the illegal or criminal action of its custodians and managers, equity will by means of a receiver, protect and preserve such fund for distribution among those entitled to it.³⁴ In such a case where fraud is the gist of the cause of action, equity will always, in a proper case, relieve against such fraud.³⁵

§ 124. Receiver for Real Estate Held in Joint Tenancy.

As between tenants in common or joint owners of real property, courts of equity manifest the same aversion to the appointment of receivers as in other cases where the jurisdiction is invoked against a defendant in possession, under claim of title in a controversy concerning the right to the disputed property.

Neither in a suit for an accounting between several joint tenants against another joint tenant in an office building, where there is no showing of fraud, entanglement of accounts, or exclusion from a due share of the net profits, was a receiver appointed.³⁶ However, where one tenant in common sued his

³² Blood v. Blood, 110 Mass. 547.

³³ Roberts v. Eberhardt (1853),
Kay 148; Barbour v. Lockard, 9
Ohio Dec. Rep. 254.

³⁴ Shaw & Simpinkson v. Int., etc.,
5 Ohio N. P. 411.

³⁵ McLaughlin v. National M. B.,
etc., 64 Fed. 908; Evans v. Coventry,
5 DeG. M. & G. 911.

³⁶ Kell v. Murdock, 4 Ohio N. P.
247.

co-tenant, who was in possession of undivided valuable property, receiving the whole of the rents and profits and excluding his companion from the receipt of any portion thereof, when such excluding tenant was insolvent, a receiver was allowed.³⁷

Courts of equity are adverse to appoint receivers of land held by tenants in common who can not agree upon the management of the estate. Where, however, the bill shows that the defendants have collected and appropriated to their own use the rents of the property ever since the complainant's title accrued, which was nearly ten months before the bill was filed and are still collecting and appropriating those rents, and the complaint is totally excluded from the possession and enjoyment of the land held in common and his co-tenants are insolvent, and the bill prays for an accounting of the rents and profits, a receiver may be necessary and may be appointed.³⁹

§ 125. Receiver for Irrigating Plant Held by Co-Owners.

The Supreme Court of Idaho ⁴⁰ recently upheld the appointment of a receiver of an irrigation plant in the following case: Plaintiff alleged that it, a fruit-land corporation, had acquired an interest in an irrigation plant and system by the purchase of water rights therein, and the irrigation company owning such system had become insolvent and unable to protect and care for its property and comply with its contracts with the plaintiff to furnish water. Plaintiff prayed among other things that the irrigating system be decreed the property of the plaintiff, that the defendants have no right, title or interest in the same, and for the appointment of a receiver and for an injunction preventing the transfer of such property during the pendency of the action.⁴¹

³⁷ Williams v. Jenkins, 11 Ga. 595.

³⁸ Rollins v. Henry, 77 N. C. 467.

³⁹ Bilder v. Robinson (1907), 73 N. J. Eq. 169, 67 Atl. (N. J.) 828.

⁴⁰ Idaho Fruit Co. v. Gt. Western Co. (1909), 17 Ida. 273, 105 Pac. 562.

⁴¹ See Atlantic Trust Co. v. Chap-

man (1907), 208 U. S. 89, 52 L. ed. 116; see Grandfalls Mut. Ir. Co. v. White (1910), 62 Tex. Civ. App. 182, 131 S. W. 233, where complainants sued for enforcement of contract with irrigating company and damages and a receiver was asked for and refused.

CHAPTER VIII

RECEIVERS OF PROPERTY HELD BY TRUSTEES AND OTHERS

ANALYSIS

SUITS AGAINST TRUSTEES—GENERALLY

- § 126. Receiver over Property Held in Trust Generally.
- § 127. Receiver when Property in Hands of Trustees Is in Danger,
- § 128. Receiver when Executors or Other Trustees Disagree.
- § 129. Receiver when Trustee Becomes Insolvent or Bankrupt.
- § 130. Receiver when Trustee Is of Drunken Habits.
- § 131. Receiver when Trustee Is Poor or Fails to Show Possession of Funds.
- § 132. Receiver for Property of Nonresident Trustee.

SUITS BY VENDOR TO ENFORCE SPECIFIC PERFORMANCE OF CONTRACT

- § 133. Receiver in Suits by Vendor to Enforce Specific Performance.
- § 134. Receiver in Suits by Vendor to Railway Company for Specific Performance.
- § 135. Receiver in Suits to Enforce Water Rights.

SUITS FOR RECISSION OF CONTRACT UNDER SPECIAL CIRCUMSTANCES

- § 136. Receiver in Suits to Rescind Contract.
- § 137. Receiver in Suits by Vendor to Vacate Fraudulent Purchase.
- § 138. Receiver in Suits by Remainderman against Life Tenant.

SUITS FOR REFORMATION OF CONTRACT

- § 139. Receiver in Suits for Reformation of Contract.

SUITS AGAINST TRUSTEES—GENERALLY

§ 126. Receiver over Property Held in Trust Generally. It was said by Lord Chancellor Hardwick:¹ A trust is where

¹ Stuart v. Mellish (1743), 2 Atk. 612. See Evans v. Coventry, 5 DeG., M. & G. 910.

there is such a confidence between parties that no action at law will lie, but is a case merely for the consideration of equity. This being true, it naturally follows that equity has jurisdiction over trusts and trustees.

An application to the court for a receiver or other protective measure is founded on the common right of persons who are interested in property which is in danger to apply for its protection.²

The general practice of the cestui que trust who seeks relief is for him to bring an action in a court of equity for the removal of the trustee and ask for the appointment of a new trustee. Proceedings for the removal of the trustee require some time and as trustees have the right to file answers to the charges against them and to a regular and full hearing, and as the cestui que trust are entitled to have the fund properly protected and taken care of *pendente lite*, the court may appoint receivers.³

Chancellor Kent, in 1822, explains the jurisdiction of chancery over trustees in the following case: A bill was filed by plaintiffs, stockholders in a bank and others as might come in and contribute to the costs and charges of the suit against the directors of the North River Bank, charging the defendants with fraud and corruption in the control and conduct of the election for directors and praying for a subpoena and injunction against nine of the new directors to restrain them from all further interference with the management and agency of the bank as directors, and that trustees and three others of the directors, or some other person be appointed receivers of the bank.

Kent, Chancellor, held: "The bill is confined to the charge of a fraudulent abuse of trust in the present directors of the bank, respecting the recent election of directors and does not charge fraud or abuse in the ordinary pecuniary concerns of

² *Rousseau v. Call* (1915), 85 S. E. 414, 169 N. C. 173.

³ *Anonymous* (1806), 2 Ves. 4; *Middleton v. Dodswell* (1806), 13 Ves. 266.

the institution. It is not the course and practice of the court to grant injunctions in limine and before answer unless the injury be pressing and the delay dangerous. The present directors were appointed by the statute incorporating the bank and nearly all the same persons are re-elected by an election colorable in point of law, though it may afterward turn out to have been fraudulent in point of fact. They are in the actual exercise of their office as trustees and it would not be very convenient or reasonable to divest them of their powers and to place in the hands of commissioners or receivers to be elected by the chancellor the capital of a bank amounting to half a million before the defendants have had an opportunity to answer the bill. A trustee is rarely, if ever, divested of his trust until he has been heard in answer to the charges against him. Nothing but the necessity of the case, such as the danger of irreparable loss, can justify a departure from this rule of common justice.”⁴

§ 127. Receiver when Property in Hands of Trustees Is in Danger. A court of equity has general jurisdiction over all matters of trust and the power by way of preventative justice to stay waste of the trust estate is a matter of elementary law.⁵ If in a proper suit, any misconduct, waste, or improper disposition of or danger to the assets in the hands of an executor or trustee are shown, the court would instantly interfere and may appoint a receiver.⁶ A receiver may be appointed even before answer made by the executor and trustee upon affidavit of misapplication and danger to the property in the hands of the executor practically when the coexecutors agree to the appointment.⁷ If the trustee omits to act when required to do so, or is careless in executing his trust or does not use necessary

⁴ Ogden v. Directors N. R. B., 6 Johns. 160.

⁵ Ex parte Walker, 25 Ala. 81, at 101; Cook v. Flagg (1916), 233 Fed. 426.

⁶ Anonymous (1806), 12 Ves. 4; Taylor v. Allen, 2 Atk. 213; Batten

v. Earnley, 2 P. W. 163; Elmendorf v. Lansing, 4 John Ch. 562.

⁷ Middleton v. Dodswell (1806), 13 Ves. 266; Jones v. Dougherty (1851), 10 Ga. 273; Calhoun v. King (1843), 5 Ala. 525.

care and diligence in the due execution of the trust which he has undertaken, a court of equity will interfere.⁸ However, the divesting of a trustee of his trust until he has been heard in answer to the charges against him is very rare. Nothing but the necessity of the case, such as the danger of irreparable loss, can justify a departure from this rule of common justice.⁹

Where property has been administered and applied without complaint according to a uniform course of management for a long series of years, the court will not by an interlocutory order disturb the possession upon the grounds that such an application is a breach of trust, unless it is clear that the party in whom the property is vested is a mere naked trustee and has not to a limited extent any of the rights or interests of an owner.¹⁰

§ 128. Receiver when Executors or Other Trustees Disagree.

When executors or trustees disagree and refuse to concur,¹¹ it is impossible to say that their accounts can be treated as executorship accounts. Furthermore, in such a case it is to be inferred that the testator intended to have the assistance and discretion of the three trustees but if they do not act amicably together, their united assistance and discretion can not be obtained and the majority act alone in the administration of the trust. In that state of things, the plaintiff is entitled to have the receiver appointed. However, when there are several trustees the disclaimer of one of them is not alone a sufficient ground for the appointment of a receiver without the consent of those who remain.¹²

Where the testator had appointed the plaintiff and defendant trustees of his will, and had bequeathed certain leasehold

⁸ Jones v. Dougherty (1851), 10 Ga. 273; Young v. Hamilton (1910), 135 Ga. 339, at 341, 69 S. E. 593.

⁹ Ogden v. Kep (1822), 6 Johns. Ch. (N. Y.) 160; action against trustee of company, In re Crossman,

20 How. Pr. 353; Rainey v. Erie R. R., 38 How. Pr. 220.

¹⁰ Skinners Company v. Irish Society (1836), 1 M. & C. 162.

¹¹ Swale v. Swale (1856), 22 Beav. 586.

¹² Browell v. Reed (1842), 1 Hare 434.

houses to them upon trust to receive the rents and profits, and pay the same to one of the defendants during her life without power of anticipation and after her death, she directed to the trustees to stand possessed of the houses for two other persons. The action was brought by one of the trustees to carry into effect the trusts of the will.

One trustee was entitled to require the covenants in the leases of which he was one of the trustees performed by means of the rents and in order to give effect to that declaration by the court it appointed a receiver.¹³

§ 129. Receiver when Trustee Becomes Insolvent or Bankrupt. It was early held in England that it was not to be inferred that a testator had a deliberate intention to intrust the management of his estate to an insolvent executor and when an executor becomes insolvent or bankrupt, it is for that a receiver be appointed¹⁴ and take property out of the hands of the executor. If a creditor's action is brought against an administrator or executor personally, it may be necessary to apply for and obtain a receiver in certain cases to prevent property of the estate of the deceased being improperly paid out¹⁵ and lost. It is said by Jessel, M. R.:¹⁶ "It makes no difference whether the bankrupt executor's or administrator's conduct had been fraudulent or not, it is not fit that a man who is bankrupt should continue to be a trustee without the consent of the cestui que trust."

§ 130. Receiver when Trustee Is of Drunken Habits. An executor's or trustee's duty is to collect the assets and pay the debts, and where peaceful conduct is so indispensable, it is material for the plaintiff who is seeking for an injunction and a receiver to enter into instances of violent conduct, and

¹³ *Fowler v. O'Dell* (1880), 16 Ch. D. 723; see *In re Comtier* (1880), C. A. 34 Ch. D. 136.

¹⁴ *Langley v. Hawk* (1820), 5 Mad. 46; *Cook v. Flagg* (1916), 233 Fed. 426.

¹⁵ *In re Radcliffe, deceased* (1877), 7 Ch. D. 733.

¹⁶ *In re Hopkins* (1881), 19 Ch. D. 61, at 63.

it is obvious that the assets can not be safe in the hands of a person who is in the habit of being drunk.¹⁷ The fact that the defendant played cards and billiards and frequented the grog shop was held of itself not sufficient to justify the court in exercising its extraordinary power to appoint a receiver for the trust property.¹⁸

§ 131. Receiver when Trustee Is Poor or Fails to Show Possession of Funds. A court of chancery will never deprive a man of a trust thrown upon him by a testator with full knowledge, merely because he is poor,¹⁹ however the fact that the executor or trustee owes debts to tradesmen may be a circumstance to show the trustee's unfitness and the necessity of a receiver to protect the property.²⁰ If a trustee, a man of moderate means, embarks in a large business after taking the trust, this fact and change of his status, together with other circumstances, may require the court to modify the terms on which the testator committed the trust to him, or appoint a receiver pending the litigation.²¹

§ 132. Receiver for Property of Nonresident Trustee. On an application for the appointment of a receiver of property, it was shown that an order for the sale thereof for delinquent taxes had been issued, that the trustee in whose custody the property had been placed was a nonresident. Held that the court did not abuse its discretion in appointing a receiver without notice, irrespective of the fact of a subsequent stay of the proceeding to sell the property.²²

¹⁷ *Everett v. Prythergch* (1841), 12 Sim. 363, at 369. *Paige* 474; see *Wood v. Wood* (1834), 4 *Paige* 298.

¹⁸ *Polythress v. Polythress* (1854), 16 Ga. 406.

¹⁹ *Anonymous* (1806), 12 Ves. 4; *Mandeville v. Mandeville* (1840), 8

²⁰ *Taylor v. Allen* (1741), 2 Atk. 213; *Bowling v. Scales* (1874), 2 Tenn. 67.

²¹ *Bowling v. Scales* (1874), 2 Tenn. 71.

²² *Cotton v. Rand* (1906), 92 S. W. (Tex. Civ. App.) 266.

SUITS BY VENDOR TO ENFORCE SPECIFIC PERFORMANCE OF CONTRACT

§ 133. Receiver in Suits by Vendor to Enforce Specific Performance. In the case of an ordinary sale of real estate or personalty unless some lien or mortgage or charge is reserved to the vendor by statute or otherwise the title passes absolutely to the vendee and the creditor has to take his chances on his pay the same as other creditors. Not being a lien creditor or a judgment creditor he can not have a receiver appointed over the property he has sold except under peculiar circumstances. For instance in a case where "the defendant, on an advance of money, agreed to execute a mortgage of certain lands but did not perform his agreement and there was an arrear of interest due on the money advanced, the bill was filed for a specific performance of the agreement and prayed for a receiver. Receiver granted." ²³

In an action for the recovery of lands or for the specific performance of a contract to purchase land, a receiver has been appointed to protect the property and impound the rents, on the ground of the defendant's insolvency and the insufficiency of the property to discharge the balance due on the purchase price.²⁴

A vendor of the business of a drug store for a price to be determined by an invoice was allowed a receiver in his action against the party to the sale contract who refused to take. The court allowed the stock sold at public auction.²⁵

In another case: The vendee of lands was in possession under only a bond for titles; he was unskillfully using them and did not repair; they were deteriorating every day in value, and they would not pay half the principal and interest due thereon;

²³ Shakel v. Duke of Marlborough (1819), 4 Madd. 463; Boehm v. Wood, 1 J. & W. 419, 2 J. & W. 236; Hall v. Jenkinson (1813), 2

Ves. & B. 125; Taylor v. Ecklersley (1876), L. R. 2 Ch. D. 302 C. A.

²⁴ Adams v. Foster (1915), 143 Ga. 701, 85 S. E. 834.

²⁵ Swisher v. Dunn (1913), 89 Kan. 412, 131 Pac. 571.

he had become insolvent, had gone into bankruptcy, and had a homestead set apart; had enjoyed the profits four years and had not paid a cent of principal or interest. If sued in ejectment he would hold the vendor at bay for years to enjoy more rents and profits; if sued on the notes the same would be the result. The vendor asked a court of equity to stop such iniquitous conduct, irremediable in any other court, and to preserve the land and their fruits to await final verdict of a jury on the facts and the decree of the court thereon.²⁶

In a suit by a vendor of lands who had secured a judgment and execution against the same, the wife of the vendee filed a pauper affidavit in lieu of giving bond, filed a bill of exceptions and carried the case to the Supreme Court of Georgia. Plaintiff alleged that the defendants were insolvent, were in possession of the property, have at all times been receiving the rents and profits thereof, that plaintiff has no other security for his debt except the property levied upon, which is not worth the amount of the judgment with interest and costs, and the defendants are not litigating in good faith but only for the purpose of remaining in possession of the property free of rent. Plaintiff asked for and obtained a receiver for such property and the Supreme Court of Georgia held he was properly appointed.²⁷

§ 134. Receiver in Suits by Vendor to Railway Company for Specific Performance. It was held in England, in 1866, that a landowner was not entitled to an injunction to restrain a railroad company from continuing in possession of land bought from the landowner but not paid for by the railway company.²⁸ In 1878 it was further held by the court of appeals²⁹ under similar circumstances that an application in such a case for an injunction and receiver is wrong. An inter-

²⁶ Tufts v. Lille, 56 Ga. 139; Gunty v. Thompson, 56 Ga. 316; see Phillips v. Eiland (1876), 52 Miss. 721; Turner v. Hicks, 4 S. & M. 294.

²⁷ Young v. Germania S. Bk. (1909), 133 Ga. 699, at 670, 66 S. E. 925.

²⁸ Pell v. Ry. Co. (1866), L. R. 2 Ch. App. Cases, 100.

²⁹ Latimer v. Ry. Co. (1878), 9 Ch. D. C. A. 385.

locutory application to restrain a railway company from *running its trains is monstrous*. “*A receiver could only be for the particular portion of the line purchased from plaintiff. What could the receiver do with that?*” In *Muns v. Isle of Wight Railway Co.* (1870), 5 L. R., ch. 414, ——— said he could not see any ground why the railway company should be in a different position from that of any other insolvent purchaser in possession of the property which he has agreed to purchase and can not pay for, but *Latimer v. Ry.* (1878), 9 Ch. Div. 385, decided by the lords justice of the court of appeals failed to mention the *Isle of Wight Railway* case and held differently.

§ 135. Receiver in Suits to Enforce Water Rights. A suit was filed by holders of water rights in an irrigating system against the irrigation company asking for damages for breach of the contract and praying for the appointment of a receiver to take charge of and to operate all the property of the irrigation system. The lower court appointed a receiver but the Court of Civil Appeals of Texas³⁰ vacated the appointment, saying: “It was not shown that the receiver has facilities for collecting those rents superior to those possessed by defendant, nor that sufficient funds for the proper operation of the plant can be collected by anyone. As shown by the findings, the lands for which water rights were purchased are worthless without irrigation.”

“The appointment of a receiver was sought not for the purpose of winding up the affairs of defendant and subjecting the assets to the liquidation of its liabilities, but for the purpose of supplying the water needed to irrigate the lands of those who had purchased water rights. In the light of the entire record, we fail to perceive how the receiver will be able to accomplish the results expected from the operation of the property of time.”³¹

³⁰ *Grandfalls Mut. Irr. Co. v. White* (1910), 62 Tex. Civ. App. 182, 131 S. W. 233. See *Atlantic Trust Co. v. Chapman* (1907), 208 U. S. 360, 52 L. ed. 528, 28 S. Ct.

Rep. 406, where a receiver was appointed of irrigating plant.

³¹ *Grandfalls Mut. Irr. Co. v. White* (1910), 131 S. W. 233, 62 Tex. Civ. App. 182.

SUITS FOR RECISION OF CONTRACT UNDER SPECIAL CIRCUMSTANCES

§ 136. Receiver in Suits to Rescind Contract. Ordinarily when a suit is brought to rescind a contract there is no ground for a receiver. There are cases, however, in which justice can only be done by the court appointing a receiver of the property. For instance, the property is a colliery and a going colliery and both sides admit that it must be kept going or the lease will be forfeited and moreover, if it is not kept going, it will be drowned out and, therefore, it is absolutely necessary it should be worked.

Said Sir Malins, V. C.: "The suit is to rescind the contract on the ground of fraudulent misrepresentation. * * * If the plaintiffs are right in their allegations, the colliery does not belong to them, but to D. & S. If the plaintiff's allegations are erroneous, then the colliery belongs to plaintiff. * * * It is according to the practice of the court to keep property in security until the right is decided and, therefore, it being totally uncertain to which of these two parties the colliery belongs, it should be kept in security. Upon principle of *Boehm v. Wood*, 2 J. & W. 236, receiver was appointed." ³²

§ 137. Receiver in Suits by Vendor to Vacate Fraudulent Purchase. Equity has power to relieve against fraud, and where a debtor, by fraudulent means, has obtained a credit in the purchase of goods, the vendor, upon ascertaining the fraud, can rescind the sale and institute proceedings to claim the goods or the proceeds thereof, whether the time of credit given the purchaser has expired or not.

The contract to give time to pay for the goods is at the instance of the seller as void as the contract of sale, and if, in such case, it is necessary for the protection of the rights and interests of the plaintiff, the court may appoint a receiver and require the debtor to turn over to such receiver his books and

³² *Gibbs v. David* (1875), L. R. 20 Equity Cases, 273, at 376.

accounts and notes and the money arising from the sale of the goods.³³

Where a creditor shows that his rights are in peril; that he has sold goods to a defendant upon the faith of the latter's representations, which were false and fraudulent; that he rescinded the contract and claimed the goods as his own and that defendant had given a mortgage on the goods to a person residing in another state, which was claimed to be fraudulent, which had been foreclosed, and under which the goods were about to be sold, a case for equitable interference is sufficiently made out.

In a case of this kind, the chancellor may look to the whole case, its general countenance and bearing, and if after considering the case as presented by the pleadings and proofs submitted he believes the ends of justice require it, put his hands upon the property in question and keep it in statu quo until a jury can pass upon the case.³⁴

However, "it is not every fraudulent act that will authorize a court of equity to take jurisdiction. It is only in cases where complete justice can not be done at law that equity will interfere. In many instances of fraud, the law courts can give as full remedy as can be had in equity. Sometimes, even when fraud has been committed, replevin or trover will give to the petitioner his goods back in kind and thus make him whole; in such a case, a suit in equity and a receiver will not lie."

§ 138. Receiver in Suits by Remainderman against Life Tenant. A tenant in tail or remainder having certain interests in the estate may come into a court of equity to have the suit established for an account and for other relief. When bringing such an action it has been very common for courts of equity to appoint a receiver to protect the estates, to collect

³³ *Martin v. Burgoyne*, 88 Ga. 78, 13 S. E. 958.

³⁴ *Bertie v. Earl of Abingdon* (1817), 3 Mer. 560; *Gresley v. Ad-*

derley (1818), 1 Swan 573; *Shore v. Shore* (1859), 4 Drew 501.

the rents and profits, keep down the interest on the encumbrances, etc.³⁵

If it is necessary to have a receiver of an estate held by a life tenant, the estate for life is inherently subject to it and it is the right of the remainderman to have a receiver appointed and to have the ordinary expense of such appointment paid out of the life estate.³⁶

SUITS FOR REFORMATION OF CONTRACT

§ 139. Receiver in Suits for Reformation of Contract. In a suit for reformation of a contract, for an accounting and for the purpose of ascertaining the amount actually due under the contract and for a foreclosure of a mortgage given to secure money loaned under the contract and where there is danger of loss of the debt if the property remains in the possession of the defendant, a receiver may be appointed to preserve the property.³⁷

³⁵ Shore v. Shore (1859), 4 Drew 501.

³⁶ Shore v. Shore, 4 Drew 501.

³⁷ Wright v. Wright (1913), 180 Ala. 343, 60 So. 931.

CHAPTER IX

RECEIVERS IN MORTGAGE AND LIEN CASES

ANALYSIS

SUITS TO ENFORCE A MORTGAGE

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 - (a) A Legal Mortgage as Known in the United States.
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- § 142. No Receiver under Legal Mortgage in England before 1873.
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- § 151. Receiver at Instance of Junior Mortgagee.
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SUITS TO ENFORCE A MORTGAGE

§ 140. **Distinction between Legal and Equitable Mortgage in England.** In order to understand the English decisions on the subject of mortgages and the cases between mortgagor and mortgagee in which a receiver may be appointed, it is absolutely necessary to observe the distinction between a legal mortgage and an equitable mortgage, as the terms are used in England.

(a) **A Legal Mortgage as Known in England.** The civil law is the spring head upon the subject of mortgages. Originally according to that jurisprudence mortgages vested the fee in the mortgagee, subject to be divested by the discharge of the debt at the day limited for its payment.¹ If default were then made the premises were finally lost to the debtor. In the progress of time, more liberal views prevailed, and the debt came to

¹ *Gilman v. Illinois & Miss. Tel. Co.* (1875), 91 U. S. 603, at 615, 23 L. ed. 405.

be considered as the principal thing, and the mortgage only as an incident and security.²

A more liberal view regarding mortgages prevails today in England, and a legal mortgage is said to be a conditional assurance to the mortgagee of the mortgagor's general property in real or personal estate. Nevertheless its effect is to vest the legal estate in the mortgagee who, unless the deed expressly provides for possession by the mortgagor until default, is entitled immediately upon the execution of the deed to possession of the property.³ According to the English conception of a legal mortgage, the legal estate passes by the deed, or instrument of mortgage, to the mortgagee.⁴ The mortgagee becomes trustee for the mortgagor.⁵ The title only becomes absolute, however, upon default in payment of the mortgage money at the time fixed, and the property remains subject to the right of redemption until such right is destroyed by foreclosure, or sale, or otherwise.⁶

(b) An Equitable Mortgage as Known in England is a contract which creates a charge on the property but does not pass the legal estate to the creditor. Its operation is that of an executory assurance, which as between the parties and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance and is enforceable under the equitable jurisdiction of the court.⁷ When there are several mortgagees in property in England, the mortgagee or mortgagees, other than the prior or first mortgager, are equitable mortgagees.⁸

§ 141. Distinction between Legal and Equitable Mortgage in the United States. (a) **A Legal Mortgage as Known in the United States.** In the early part of the nineteenth century, legal mortgages as now known in England were very common

² *Gilman v. Illinois & Miss. Tel. Co.* (1875), 91 U. S. 603, at 615, 23 L. ed. 405; *Halsbury's Laws of England, Mortgage*, par. 131.

³ *Halsbury's Laws of England, Mortgage*, par. 131.

⁴ *Doe v. Lightfoot* (1841), 8 M. & W. 564.

⁵ *Halsbury's Laws of England, Mortgage*, par. 131.

⁶ *Halsbury's Laws of England, Mortgage*, pars. 131, 132.

⁷ *Berney v. Sewell*, 1 J. & W. 647, at 648.

⁸ *Cortleyeu v. Hathaway*, 11 N. J. Eq. 39.

in the United States.⁹ At that time the courts followed the English conception of a mortgage and still follow it in a few states.¹⁰ As early as 1826, however, the Supreme Court of Ohio¹¹ said: "The courts have always considered the title of mortgaged premises to remain in the mortgagor, as against all the world, except the mortgagee, and also as against him until the deed becomes absolute at law by the nonperformance of the condition, and the mortgagee takes legal steps to reduce the premises to possession." This ruling was reached by the courts in an attempt to carry out the contract entered into between the parties according to its true intent and spirit by treating the mortgage deed at law as in equity, as a security for the payment of money or an indemnity against liability incurred by the mortgagee for the benefit or at the instance of the mortgagor, the conveyance to be void when the stipulated condition shall be performed.¹² Most states have either by decision or by statute abolished the mortgage known in England as the legal mortgage. In such states, therefore, even if a mortgage is in the form of the civil mortgage, deeding the property to the mortgagee, nevertheless the courts will not permit the mortgagee to bring ejectment. In some few states where the so-called legal mortgage is still recognized and allowed, the mortgagee can bring ejectment.¹³ In the United States, the term legal mortgage as distinguished from an equitable mortgage very often means an instrument whether legal or equitable (as the terms are used in England), which is in actual form a mortgage, as distinguished from the term equitable mortgage as often used in the United States, meaning an instrument or transaction, which

⁹ Cranch, J., in Cir. Ct. of District of Columbia; *Oliver v. Decatur* (1834), 4 Cranch C. C. 458.

¹⁰ *Frisbie v. Bateman* (1873), 24 N. J. Eq. 28, at 30; *Cortleyeu v. Hathaway* (1855), 11 N. J. Eq. 39.

¹¹ *Lessee of Ely v. McGuire*, 2 Ohio 223; *Beser v. Hawthorn*, 3 Ore. 129, at 133; also *Mayo v. Fletcher* (1833),

14 Pick. 525, at 532; see also *Goodwin v. Richardson* (1814), 11 Mass. R. 473; *Teal v. Walker* (1883), 111 U. S. 242, at 251, 28 L. ed. 415.

¹² *Newport, etc., v. Douglas*, 12 Bush (Ky.) 673, at 704.

¹³ *Cortleyeu v. Hathaway* (1855), 11 N. J. Eq. 39; *Frisbie v. Bateman* (1873), 24 N. J. Eq. 28, at 30.

does not call itself a mortgage, but which the courts will construe to be a mortgage.¹⁴

(b) An Equitable Mortgage as Known in the United States. When the conception of a mortgage known to the civil law, in England known as the legal mortgage, was abolished in many of the states, either by court decisions,¹⁵ or by statute,¹⁶ it was because of the more liberal view prevailing, and it was because the courts were in a sense emphasizing the rights of the debtor. Under this new view, the mortgage debt came to be considered as the principal thing, and the mortgage only as an incident and security.¹⁷ Most of the courts hold that the mortgagee not having the legal title can not bring ejectment. If the mortgagee has not the legal title the mortgagee may most properly be called an equitable mortgagee and so he is called in England.

The term equitable mortgage, as used in America, however, is generally applied to an instrument or transaction which is not called by the parties to it a mortgage, but which in fact is a mortgage and which the court will construe to be a mortgage in spite of what the parties call it.

"If a transaction resolve itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage, and the parties can not, by any covenant or agreement, limit the rights of the mortgagor or cut off his equity of redemption after a limited period."¹⁸

Where the intention is clear that an absolute conveyance is taken as a security for a debt, it is in equity a mortgage.¹⁹

§ 142. No Receiver under Legal Mortgage in England before 1873. Before the Judicature Act of 1873, which among

¹⁴ *Flagg v. Mann* (1837), 2 Sum. (U. S. C. C.) 486, at 533.

¹⁵ *Lessee of Ely v. McGuire* (1826), 2 Ohio 223.

¹⁶ *Compiled Laws of Michigan*, Vol. 3, sec. 11006, cited in *Union Trust Co. v. General Elec. Co.* (1908), 152 Mich. 568, at 576, and cases there cited; 16 N. W. 379.

¹⁷ *Gilman v. Illinois & Miss. Tel. Co.* (1875), 91 U. S. 603, at 615, 23 L. ed. 405.

¹⁸ *Flagg v. Mann* (1837), 2 Sum. (U. S. C. C.) 486, at 533.

¹⁹ *Hinchfield v. Milliken*, 71 Me. 567, at 570; *Hawes v. Williams*, 92 Me. 483, 43 Atl. 101; *Campbell v. Dearborn*, 109 Mass. 130.

other things allowed a receiver to be appointed at the instance of a legal mortgagee, the rule undoubtedly was that where a mortgagee files his bill to foreclose, if he had the legal estate and could take possession at once by ejectment, neither the chancery court, nor any other court, would grant him a receiver for he could, if he thought fit, take possession without the help of a court.²⁰ One of the objections a mortgagee often had to taking possession himself was the necessity of keeping very strict accounts and the mortgagee was "subject to have an account taken against him with a greater degree of severity than in other cases."²¹

Mortgagees did not find it to their advantage to enter upon estates if they could get their interest regularly paid, for from the time that they got possession, their situation was far from desirable, from the constant state of preparation that they must be in to account to the mortgagor whenever he shall be ready to discharge the mortgage debt.²² The entry into possession by a mortgagee was always considered a strong assertion of his legal rights, since he did not come under any obligation to account to the mortgagor except in a suit for redemption. He was accordingly treated with exceptional severity in a suit for redemption and made to account not only for what he actually received but for what he might, without wilful default, have received. This was bad enough when there was only one mortgage, but the position became much worse when the mortgage was a second mortgage, since the second mortgagee could at any moment be turned out by the first, and for the sake of such precarious possession it could seldom be worth while for a second mortgagee to incur the liabilities of a mortgagee in possession. Still greater were the risks and less desirable the possession when the mortgaged property consisted of or included as it might do property embarked in trade and subject to the

²⁰ *Ackland v. Gravener* (1862), 31 Beav. 482, at 484; *Berney v. Sewell*, 1 J. & W. 647, at 648.

²¹ *Ackland v. Gravener* (1892), 31 Beav. 482, at 484.

²² *Doe dem Fisher v. Giles* (1829), 5 Bing. 428.

vicissitudes of commercial business.²³ The mortgagee when he received the rents and profits was regarded as the bailiff of the mortgagor.²⁴

§ 143. Receiver under Cranworth Act of 1860 and Conveyancing Act of 1881. Under the ordinary conception of mortgage as obtains in England, the mortgagee has the legal estate and right to possession the minute the instrument is executed.²⁵ Mortgagees, however, by reason of the almost penal liabilities imposed upon them when in possession, hesitated to take possession.²⁶ This circumstance rendered any security for the mortgagor against hasty actions of ejectment unnecessary.²⁷ Courts of equity were very slow to decide that possession had been taken, and would not do so unless satisfied that the mortgagee in possession took the possession in his capacity of mortgagee without any reasonable grounds for believing himself to hold in any other capacity.²⁸ The courts did not possess any means which would enable the mortgagee to obtain the advantages of possession without its drawbacks. Mortgagees evolved the plan of inserting in the instrument of mortgage a provision that the mortgagor name a person who should be attorney in fact or receiver to act, and to receive the income, keep down the interest on incumbrances and hold the surplus if any for the mortgagor. At times the attorney in fact, or receiver as he was called, had extensive powers of management besides.

The next step in the evolution of out-of-court receivers in the case of mortgages was for the mortgagee to stipulate that they themselves should in place of the mortgagor appoint the receiver who was, however, to act as the mortgagor's agent. By being the mortgagor's agent no liability was imposed upon the mortgagee.

²³ *Gaskill v. Gosling* (1896), C. A. 1 Q. B. 691.

²⁴ *Parkinson v. Hanbury* (1867), 2 E. & Irish App. 1, at 15.

²⁵ *Berney v. Sewell*, 1 J. & W. 647, at 649.

²⁶ *Doe dem Fisher v. Giles* (1829), 5 Bing. 428.

²⁷ *Doe dem Fisher v. Giles* (1829), 5 Bing. 428.

²⁸ *Parkinson v. Hanbury* (1867), L. R. 2 H. of L. 1 (1867), 2 E. & Irish App. 1.

The mortgagor could not revoke the appointment of a receiver or that appointment would be useless. For value received he had committed the management of his property to an attorney in fact whose appointment he can not interfere with.²⁹

The practice of mortgagees thus securing the appointment of attorneys in fact, or an out-of-court receiver by agreement between parties became so common that the Lord Cranworth Act³⁰ was passed, and afterwards the Conveyancing and Law of Property Act of 1881. These two acts in a more general manner give by statute a power to a mortgagee to appoint a receiver or attorney in fact who is to be agent of the mortgagor when such a right is not excluded by agreement between the parties.

"The Act of 1881" in itself is useful only as a statutory recognition and approval of the practice of making the mortgagee's appointee the agent of the mortgagor only; but, of course, any of its provisions may be embodied in as they may be excluded from any particular mortgage security by express agreement between the parties.³¹ And yet, where an action for foreclosure is pending and the parties are at arm's length, it would seem that the receiver should be appointed by the court. The mortgagor can have the nomination of the receiver made at chambers.³²

§ 144. Receiver in England under Legal Mortgage after 1873. Before 1873 no receiver was allowed on application of a legal mortgagee. However, the Judicature Act of 1873,³³ among other things, allowed a mortgagee having the legal estate to have a receiver appointed to relieve the mortgagee from going into possession and incurring all the obligations incident thereto. Under this act, it has been held that one who is both legal and equitable mortgagee may have a receiver appointed

²⁹ Gaskill v. Gosling (1896), C. A. 1 Q. B. D. 693.

³⁰ 23 and 24 Vic. (1860), ch. 145.

³¹ Gaskill v. Gosling (1896), C. A. 1 Q. B. D. 693.

³² Tillet v. Nixon (1883), 25 Ch. D. 238-239.

³³ Judicature Act of 1873; see Conveyancing Act of 1881, 44 and 45 Vic.

without prejudice to the right of prior incumbrancers to take possession under their security.³⁴ The Act of 1873 was passed to help the mortgagees obtain the advantages of possession without its drawbacks.³⁵ Under subsec. 8 of sec. 25 of the Judicature Act of 1873, the court has a discretion as to the appointment of a receiver, and a receiver may be appointed at the instance of the legal mortgagee, but he has no absolute right to a receiver.³⁶

§ 145. Receiver under Equitable Mortgage in England. A receiver in England who had not the right to take possession was called an equitable receiver. He had an equitable interest in the property which a court of equity was bound to protect. Before the English Judicature Act of 1873, the legal mortgagee was not entitled to a receiver because he could protect himself by taking possession and enforce his security. The only way an equitable receiver could enforce his security was to have a receiver appointed.³⁷

A receiver may also be appointed in such cases to determine the priorities among several equitable mortgages or liens.³⁸

Second mortgagee when the first mortgagee will not take possession may have a receiver, care being taken at the time that the order for the receiver shall not prevent any who have a better title to the possession from ousting him if they please.³⁹

§ 146. No Receiver in England against Mortgagee in Possession. It is not the practice of the court to appoint a receiver against a mortgagee in possession, so long as he will swear there

³⁴ Pease v. Fletcher, 1 Ch. D. 273; Habershorn v. Gill (1875), W. N. 231.

³⁵ Gaskill v. Gosling (1896), C. A. 1 Q. B. D. 691.

³⁶ Porytherch v. Porytherch (1889), 42 Ch. D. 590.

³⁷ Berney v. Sewell, 1 J. & W. 647; Brooks v. Greathed, 1 J. & W. 176; Reid v. Middleton, Turn. & R. 455; Truman v. Redgrave, L. R.

18 Ch. D. 547; Peck v. Trunsmaran Ins. Co., 2 Ch. D. 115.

³⁸ Davis v. Duke of Marlborough, 2 Evanston 108; Angel v. Smith, 9 Ves. 335; Pritchard v. Fleetwood, 1 Mer. 54; Smith v. Earl of Effingham, 2 Beav. 232; Brooks v. Greathed, 1 J. & W. 176; Cortelyeu v. Hathaway, 11 N. J. Eq. 39.

³⁹ Tanfield v. Irvine, 2 Russ. 149, at 151.

is a balance due him. Although the fact may be contested, the court can not determine it on affidavits.⁴⁰

"The rule about receivers is very clear. A mortgagee who has the legal estate can not have a receiver; an equitable mortgagee may, but he can not if the first is in possession. I know of no case where the court has appointed a receiver against a mortgagee in possession unless the parties making the application will pay him off and pay him off according to his demand as he states it himself."⁴¹

§ 147. Receiver for Mortgaged Property in America. When the American colonies and the American states adopted the common law and chancery law of England, they adopted the English theory of legal mortgages. However, the United States started as a debtor nation. And each new state as it entered the Union started as a debtor state when compared with the older states where capital had had more time to accumulate. These facts together with other tendencies led courts and legislatures of the United States to take a more friendly attitude toward the debtor classes. In considering mortgages the debt came to be considered as the principal thing and the mortgage only as an incident and security.⁴² That was an advance over the civil conception of a mortgage. In states where there was neither any statute nor any court decisions against bringing ejectment the mortgagee had this right and a suit in ejectment.⁴³ At the same time, contrary to the old law in England, before it was changed by the Judicature Act of 1873, the mortgagee in America was held to have the additional right to foreclose by

⁴⁰ *Berney v. Sewell*, 1 J. & W. 627; *Rowe v. Wood*, 2 J. & W. 557; *In Arrell v. Beckford*, 13 Ves. 377; *Codrington v. Parker*, 14 Ves. 469.

⁴¹ *Berney v. Sewell*, 1 J. & W. 647, at 649. See *Judicature Act* (1873)—(25) 8.

⁴² *Lessee of Ely v. McGuire* (1826), 2 Ohio 223; *Goodwin v.*

Richardson (1814), 11 Mass. 473; *Mayo v. Fletcher* (1833), 14 Pick. 525, at 532.

⁴³ *Frisbie v. Bateman* (1873), 24 N. J. Eq. 28, at 30; *Gilman v. Illinois & Miss. Tel. Co.* (1875), 91 U. S. 603, at 615, 23 L. ed. 405; *Cortelyou v. Hathaway* (1855), 11 N. J. Eq. 39.

a suit in equity.⁴⁴ Whenever he has a right to and brings suit in equity, he may have a receiver appointed, provided the judge or chancellor in his discretion decides that a receiver is necessary. A few well-recognized conditions must exist to justify the judge or chancellor in appointing a receiver. A number of the states have put these conditions in statutory form as follows: A receiver may be appointed "in an action by a mortgagee for the foreclosure of his mortgage and sale of mortgaged premises, when it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed and the property is probably insufficient to discharge the mortgage debt."⁴⁵

§ 148. Receiver for Mortgaged Property in America Irrespective of Statute. The power of a court of chancery to appoint a receiver *pendente lite*, in foreclosure cases, is a part of its incidental jurisdiction not depending upon any statute and which it exercises whether by reason of the insufficiency of the security, or the subject-matter of the mortgage is being impaired or wasted,⁴⁶ or other reason, equity requires that the rents and profits of the mortgaged property pending the litigation should be impounded and retained, to be applied upon the debt to be ascertained by the final judgment.⁴⁷ This general doctrine is recognized by the statutes in many states.⁴⁸ These statutes generally codify and recognize the equitable doctrine set out above, and these statutory enactments should be construed by the light of the established principles of equity jurisprudence. It will never be presumed that in the enactment

⁴⁴ *Gilman v. Illinois & Miss. Tel. Co.* (1875), 91 U. S. 603, at 615, 23 L. ed. 405; *contra*, *Cortelyou v. Hathaway*, 11 N. J. Eq. 39.

⁴⁵ *Ohio Statutes*, General Code of 1910, sec. 11894, subsec. 2.

⁴⁶ *Davis v. Jacksonville & P. Ry. Co.* (1913), 180 Ill. App. 1; *Young v. Hamilton* (1910), 135 Ga. 339, 69 S. E. 593.

⁴⁷ *Hoßenbeck v. Donnell*, 94 N. Y. 342; *Albritton v. Lott-Blacksher* (1910), 167 Ala. 541, 52 So. 653; *Kountze v. Omaha Hotel Co.* (1882), 107 U. S. 378, at 395, 27 L. ed. 609; *Grant v. Phoenix Life Ins. Co.* (1886), 121 U. S. 105, at 117, 30 L. ed. 905.

⁴⁸ *Indiana Revised Statutes* (1881), sec. 1222; *Ohio General Code* (1910), sec. 11894.

of a given statute the legislature intended to make any innovation upon the common law further than the necessity of the case required.⁴⁹

§ 149. Receiver of Mortgaged Property in America on Account of Inadequate Security. The right of a mortgagee to the appointment of a receiver pending a suit for foreclosure rests upon the general principle that the appointment is necessary for the preservation of the property, and its appropriation to pay their mortgage debt.⁵⁰

The power of courts of chancery to appoint receivers is a discretionary power to be exercised with great caution.⁵¹ To appoint a receiver of the property of a mortgagor before final hearing is a strong measure not to be adopted but in a strong case. A receiver should not be appointed unless without it the complainant would be in danger of suffering irreparable loss.⁵² It was early held in New York state,⁵³ if the whole mortgage money was now due, and the premises were not of sufficient value to pay the debt and costs, the court might consider the complainant in equity as immediately entitled to the whole estate pledged as a security for the payment of such debt and costs, so as to authorize the appointment of a receiver of the rents and profits in anticipation of a decree, at any time after the filing of the complainant's bill. But no such equity can arise where the debt is not yet due and when the mortgagee has neglected to take a pledge of the rents and profits of the whole premises to keep down the accruing interest in the meantime.⁵⁴

Where there is a mortgagor, or other party to the suit, who is personally liable for the debt secured by the mortgage, in case the amount raised upon sale shall be found insufficient

⁴⁹ *Merritt v. Gibson* (1891), 129 Ind. 173, 27 N. E. 136.

⁵⁰ *Meyer v. Thomas* (1901), 131 Ala. 111, at 116, 30 So. 89; *Latimer v. Moore* (1846), 4 McLean 110.

⁴¹ *Milwaukee & Minn. Railroad Co. v. Soutter* (1864), 2 Wall. 510, 17 L. ed. 861.

⁵² *Pullman v. C. & C. R. R. Co.* (1865), 4 Biss. 35, at 47.

⁵³ *Bank of Ogdensburg v. Arnold* (1835), 5 Paige 39.

⁵⁴ *Bank of Ogdensburg v. Arnold* (1835), 5 Paige 39; *Sea Ins. Co. v. Stebbins*, 8 Paige 566; *Shotwell v. Smith*, 3 Ed. Ch. 588.

to pay the debt and costs, the party applying for such receiver must not only satisfy the court that there is a probability that the mortgaged premises will not sell for enough to satisfy the decree but also that the party who is thus individually liable, is himself irresponsible for the probable amount of an anticipated deficiency after paying all his other just debts.⁵⁵

When the mortgagor remains in possession, taking the rents and profits, unless he is insolvent, and because of the insolvency there is peril of their loss, the possession will not be disturbed by the appointment of a receiver, nor will it be disturbed though the mortgagor may be insolvent and the property is inadequate security, if he is applying the rents and profits to the reduction of the mortgage debt.⁵⁶

The New Jersey courts, which hold the old English conception of a mortgage and allow the mortgagee to bring ejectment against the mortgagor, say: "I am unwilling to adopt the rule that in an ordinary case the mere inadequacy in the value of the mortgaged premises and insolvency of the mortgagor are a sufficient foundation for the appointment of a receiver. A mortgagee takes his security with full knowledge of its value, and if he takes an inadequate security it is his own fault. If the buildings have been burnt down, or have been permitted to decay, or waste committed, and the property has depreciated in value through the fault or negligence of the mortgagor or tenant in possession, or where there is any act on the part of the mortgagor or such tenant which shows fraud on his part, or makes him chargeable with bad faith in misappropriating the rents and profits for other purposes than that of keeping down encumbrances in such cases, the court may properly appoint a receiver."⁵⁷

⁵⁵ Sea Ins. Co. v. Stebbins (1841), 8 Paige 562.

⁵⁶ Warren & Co. v. Pitts (1896), 114 Ala. 69, 21 So. 494.

⁵⁷ Cortelyou v. Hathaway (1855), 11 N. J. Eq. 30, at 43; see also Warren Co. v. Pitts (1896), 114

Ala. 65, at 69, 21 So. 494; also Myton v. Davenport, 51 Iowa 583, 2 N. W. 402; see Conover v. Grover (1879), 31 N. J. Eq. 539, at 542, where a receiver was appointed over mortgaged premises and of rents and profits.

§ 150. Receiver of Mortgaged Perishable Property in America. There are cases where equity may appropriately interfere to convert perishable property into cash in order that the fund may remain intact for distribution according to the respective rights of the parties litigant as they shall be ascertained.⁵⁸ An injunction may frequently be asked against the party in possession of such property asking that he be enjoined from disposing of or injuring the property and if necessary a receiver be appointed to convert the property into money, if it is perishable, or such sale is for the better protection of the parties interested.⁵⁹

§ 151. Receiver at Instance of Junior Mortgagee. It has been recently held in Alabama that where real property was of insufficient value to pay the mortgages against it and the mortgagor was insolvent, the complainant, the holder of junior mortgages, though in possession, was entitled to institute foreclosure proceedings and obtain a receiver, notwithstanding such junior mortgagee could retain possession by accepting an option renewing its possessory agreement for another year and binding itself to extend its mortgages for that time and to pay interest and taxes. The reason given by the court for the appointment was the necessity of preserving the rents.⁶⁰

§ 152. Receiver to Foreclose Mortgage, Trustee Refusing to Do It. Trustees are at all times subject to the jurisdiction of courts of equity, even though they are appointed under private agreements. When large properties are mortgaged it frequently happens that the mortgage runs to a trustee who acts for the bondholders or others. In such cases the powers and duties of the trustees are set out either in the mortgage or other trust agreement. If such trustees act in disregard of

⁵⁸ Harned v. Rowand (1908), 74 N. J. Eq. 244, 69 Atl. 181.

⁵⁹ Long Dock v. Mallery (1858), 12 N. J. Eq. 431.

⁶⁰ Albritton v. Lott-Blacksher (1910), 167 Ala. 541, 52 So. 653.

the rights and interests of the holders of the bonds secured by the mortgage and of the responsibilities and liabilities imposed upon them and in a proper case do not take steps to enforce the mortgage or foreclose the same and act in violation of the rights of the complainants, such bondholders or other cestuis que trust may come into a court of equity and ask for an injunction or accounting or other equitable relief and for a receiver.⁶¹

§ 153. Receiver at Instance of Mortgagor. It is not impossible for a court to appoint a receiver at the instance of the mortgagor,⁶² but it is not frequent, for the simple reason that the mortgagor is generally in possession himself and therefore will not be likely to ask a court to have a receiver take possession. There are cases, however, when a mortgagee may be in possession and in such a case the mortgagor out of possession, when he can show that the property is being destroyed or make other proper showing, may have a receiver appointed.⁶³

§ 154. Receiver of Mortgaged Property before Default of Mortgagor. Upon principle a mortgagee is entitled to have his security protected if it is in jeopardy, such as if waste is taking place.⁶⁴

A receivership is auxiliary to the main suit; it is a remedy authorized by the court and not an absolute right to which the litigant is entitled. A court is not primarily the arm of our government to protect property. That duty devolves upon the executive department both in England and the United States, except in the cases of property of idiots, lunatics, children and deceased, where there is no one to take charge of the property

⁶¹ *Mason v. York & Cumberland Ry.* (1861), 52 Me. 82, at 87; *Young v. Hamilton* (1910), 135 Ga. 339, 69 S. E. 593.

⁶² *Sibson v. Hamilton & Rouke Co.* (1899), 21 Wash. 362, 58 Pac. 219.

⁶³ *Sibson v. Hamilton & Rouke Co.* (1899), 21 Wash. 362, 58 Pac. 219; see *Quinn v. Brittain* (1839), 3 Ed. Ch. 314.

⁶⁴ *McMahon v. North Kent Iron Wks.* (1891), 2 Ch. 148.

unless the state steps in through the courts. The courts will not protect property except as ancillary or provisional to the court's granting relief asked of them in a main case properly before the court.

When the state steps in such cases as idiots, etc., it does so following the ancient authority of the king over the property of such persons. There being no one to hold such property it either went to the king for his own use or for the use of some other persons. The king by his sign manual delegated to his chancellor the business of caring for the estates of such persons. Such a function by the chancellor was more in the nature of executive than judicial, nevertheless the practice has continued to our day and surrogates, chancery, probate, orphans' and other courts are given by statute and by law certain administrative functions.⁶⁵

If a default has not taken place the mortgagee is not entitled to foreclosure. But the mortgagee or other lienholder has certain interests and rights in property pledged. He has a right to have these rights and interests in the pledged property protected by a court of equity if any of these rights are violated. Such protection may be sought by an injunction

⁶⁵ There are American cases which hold, and we think properly, that where it is shown that there has not been an absolute forfeiture under a mortgage of personal property liable to perish, yet the court will protect the complainant's lien on the mortgaged premises while the lien exists by an injunction and receiver, or order the property sold clear of all incumbrances for the benefit of creditors. Difficulties which may be in the way of the appointment of a receiver in the case of a mortgage upon land do not exist in such a case of personalty. *Long Dock Co. v. Mallery* (1858), 12 N. J. Eq. 431.

There are also American cases which hold that where default is

imminent and manifest, though none has actually taken place, a temporary receiver of a railroad may be appointed on application of the mortgagee, bondholder upon a bill for an injunction against attack upon the mortgaged property. *Rutherford v. Pennsylvania Mid. Ry.*, 178 Pa. St. 38, 35 Atl. 926; *Davis v. Jacksonville Ry.* (1913), 180 Ill. App. 1, at 13; *Brassey v. New York, etc., Ry.* (1884), 19 Fed. 663.

Said the Mississippi Supreme Court in 1890: "There is no reason for limiting the doctrine to railroad companies." *Thompson v. Natchez Water Co.* (1890), 68 Miss. 428, 9 So. 821, citing *Long Dock Co. v. Mallery*, 1 Beasley's Rep., 12 N. J. Eq. 93 and 431.

proceeding, an accounting or otherwise. If in such a proceeding brought by a lienholder or other interested party, either before or after default of the mortgagor, a receiver is necessary to protect the property from waste or destruction, the court should appoint one. However, the court should not apply the equitable remedy of receivership unless it is invoked by a proper suit alleging some right has been violated.

A receiver is not generally appointed in England in the case of an ordinary mortgage of definite property,⁶⁶ because an injunction will generally provide sufficient remedy and protection to the mortgagee.⁶⁷

Receiver on Behalf of Debenture Holders before Default.

In England joint stock companies frequently issue what are called "debentures."⁶⁸ These debentures are a floating or inchoate charge on all the assets of the company, including uncalled capital. The floating assets can be disposed of in the ordinary course of business in spite of the charge of the debentures. But when the company fails to pay interest for a certain period, or defaults in the principal, or fails to keep the property insured, or if an order is made or a resolution passed by the winding up of the company, or if execution, sequestration extent or other process of any court or authority is sued out against the property of the company for any sum whatever,⁶⁹ or when other specified conditions or events happen, then the security crystallizes,⁷⁰ that is, becomes absolute, and the company can not deal with it as its own.

The English courts hold that in an action by debenture holders of a limited company to enforce their security, the court has jurisdiction to appoint, not only a receiver of the company's property, but also a manager of its undertaking

⁶⁶ *Legg v. Mathieson* (1860), 2 Giff. 71; *Edwards v. Standard Rolling Stock Syndicate* (1893), 1 Ch. D. 574, at 577.

⁶⁷ *Legg v. Mathieson*, (1860), 2 Giff. 71.

⁶⁸ *In re Standard Mfg. Co.* (1891), 1 Ch. D. 627; *Edwards v.*

Standard Rolling Stock Syndicate (1893), 1 Ch. D. 574.

⁶⁹ See conditions in *In re Standard Mfg. Co.* (1891), 2 Ch. D. 627, at 631.

⁷⁰ *In re Victoria Steamship, Ltd.* (1897), 11 Ch. D. 158, at 161.

and business where the security is in jeopardy, as for instance, where the company is practically insolvent and there is a pending winding-up petition, notwithstanding that the security has not yet crystallized by the debenture debt having become actually due.⁷¹

The appointment of a receiver is such a debenture action in effect, crystallizes the security and so protects the debenture holders. The issuing of an injunction would not accomplish this protection.

§ 155. Appointment of Receiver before Suit to Foreclose.

It frequently happens that a receiver is appointed over property under a creditor's bill,⁷² or otherwise, and subsequently a suit is filed to foreclose a mortgage over all or part of the property in the receiver's hands. Leave to file such a foreclosure suit must be first obtained⁷³ in the court which appointed the receiver. When the foreclosure suit is filed the original creditor's suit and the foreclosure suit by leave of court⁷⁴ are frequently consolidated,⁷⁵ and the receivership by proper order of court extended over the foreclosure suit.⁷⁶

§ 156. Where Receiver has Right to Rents and Profits in Mortgage Cases. (a) English Cases. Lord Mansfield said, in 1784: "The mortgagee of a ship can not sue in his own name for the freight accruing after the mortgage. Until the mortgagee takes possession, the mortgagor is the owner to all the world and is entitled to the profits made."⁷⁷ However, Lord Coke says,⁷⁸ "For what is the land but the profits thereof." That a receiver when appointed over land in mortgage is entitled

⁷¹ In *re Victoria Steamship Co.* (1897), 1 Ch. D. 158; *McMahon v. North Kent Iron Works Co.* (1891), 2 Ch. D. 148; *Edwards v. Standard Rolling Stock Syndicate* (1893), 1 Ch. D. 574.

⁷² *Chicago & A. R. Co. v. United States, etc., T. Co.* (1915), 225 Fed. 940, at 942.

⁷³ See Forms, vol. II, *infra*.

⁷⁴ See Forms, vol. II, *infra*.

⁷⁵ See Forms, vol. II, *infra*.

⁷⁶ See Forms, vol. II, *infra*.

⁷⁷ *Chimney v. Blackman*, 3 Doug. 391.

⁷⁸ Lord Coke, *Coke on Litt.*, 4b.

to the rents and profits then in arrears⁷⁹ and to the rents and profits accruing after the appointment, seems never to have been seriously disputed in England⁸⁰ and Ireland,⁸¹ although there has never been a great deal of litigation on the subject in the United States. Even in England, however, under a legal or other mortgage, the mortgagee or receiver is not entitled to the rents and profits until he takes possession. And a mortgagee who has not entered into possession is not entitled to an account from a second mortgagee who has been in possession.⁸² Probably the reason why there has not been much litigation in England on the question whether or not the receiver is entitled to the rents and profits is because in ordinary mortgages, in England, the mortgagee gets the legal title when the mortgage deed is executed and holds it as trustee for the mortgagor. The first mortgagee is entitled to the rents and profits if he goes into possession and also has the legal title. Although before the Judicature Act of 1873, a legal mortgagee in England did not have a right to a receiver, now he has a right and it does not seem to be doubted in England that the receiver is entitled to the rents and profits accrued and unpaid and accruing after the receiver is appointed.

(b) American Cases in State Courts. We have seen that in most states of the Union the right of a mortgagee to ejectment, that is to take possession of the mortgaged property without an equitable foreclosure suit has been abolished either by statute, as was done in New York⁸³ and other states⁸⁴ in 1828, in Ohio by decision on or before 1826,⁸⁵ and in most of the other states by one or the other methods. There is no

⁷⁹ Lord Langdale, M. R., in *Codrington v. Johnston* (1838), 1 Beav. 520, at 524.

⁸⁰ *Lloyds v. Mason* (1837), 2 M. & C. 487.

⁸¹ *The Agra Bank v. Barry* (1869), 3 Irish Rep. Equity, 443, at 450.

⁸² *Garfitt v. Allen* (1887), 37 Ch. D. 48, at 50.

⁸³ See *Hollenbeck v. Donnel* (1884), 94 N. Y. 342, at 344.

⁸⁴ Michigan Compiled Laws, Vol. 3, sec. 11006, commented upon in *Union Trust Co. v. General Elec. Co.* (1908), 152 Mich. 568, at 576, and cases there cited; 116 N. W. 379.

⁸⁵ *Lessee of Ely v. McGuire* (1826), 2 Ohio 223.

question either in England⁸⁶ or in America,⁸⁷ that where a mortgagee is out of possession, it is the corpus of the property, not its rents and profits which constitute the funds for the satisfaction of the debts. A mortgagee is, therefore, not entitled as a matter of right, in the absence of any stipulation of contract on the subject, to claim the rents or hires of the mortgaged property pending the litigation.⁸⁸ However, "if the whole mortgaged money is due, and the premises are not of sufficient value to pay the debt and costs, the court might consider the complainants in equity as immediately entitled to the whole estate pledged as security for the payment of such debt and costs, so as to authorize the appointment of a receiver of the rents and profits, in anticipation of a decree, at any time after the filing of the complainant's bill."⁸⁹ This doctrine was stated at length in 1844 by Chancellor Edwards of New York, as follows:

"Notwithstanding the right of entry of a mortgagee has been abolished by our Revised Statutes (of 1828) and there is no longer any existing analogy between putting a receiver into possession of mortgaged premises and any legal right or remedy which a mortgagee now enjoys, or may resort to, yet the court of chancery has persevered in its ancient practice (doubtless borrowed from the practice of chancery in England and where a different state of things exists in regard to the legal rights and remedies of a mortgagee) of appointing a receiver over a mortgagor and his tenants after default made in payment of the principal debt and a well-grounded apprehension of a deficiency of the security. This has been the practice so long and it is so firmly established by order of the chancellor—and even I believe in cases without reference to the point whether by the terms of the mortgage, the rents and profits

⁸⁶ *Chimney v. Blackman*, 3 Doug. 391.

⁸⁷ *Whitman v. Parks*, 3 Humph. (Tenn.) 95, at 99.

⁸⁸ *Williams v. Noland*, 2 Tenn. Ch. 151, at 154.

⁸⁹ *Bank of Ogdensburg* (1835), 5 Paige 39; see *Lea Ins. Co. v. Stebbins* (1841), 8 Paige 565; *Quincy v. Cheesman* (1846), 4 Sandf. Ch. 405.

were expressly pledged is not a part of the security—that I am not at liberty to depart from it or to doubt the authority of the court in this particular. At the same time I confess myself unable to discover the analogy of the principle under our laws in relation to the nature and true character of a mortgage which authorizes such an interference with the legal rights of a mortgagor unless indeed he has by the express terms of his contract pledged the rents and profits, as well as the corpus of the estate, as security for the debt.”⁹⁰ Later on, the Supreme Court of New York again reviewed the subject as follows:

“In New York state and other states where the legal title remains in the mortgagor until foreclosure and sale, the legal right to the rents as well as to the possession continues in the mortgagor until foreclosure and sale, and it does in a vendor until conveyance. But when default has been made in the condition of the mortgage, the mortgagees at once become entitled to a foreclosure of the mortgage and a sale of the mortgaged premises. This process requires time and in general principles of equity. The court may make the decree, when obtained, relate back to the time of the commencement of the action and where necessary for the security of the mortgage debt, may appoint a receiver of the rents and profits accruing in the meantime, thus anticipating the decree of sale.”⁹¹

Said Brickell, C. J., of the Supreme Court of Alabama (1896),⁹² “It is the general doctrine of courts of equity of this state, that if the mortgagor is in possession, and is insolvent, and the mortgaged premises are of inadequate security, though there is not a specific grant or pledge of the rents and profits, as between the mortgagee, the courts will intercept the rents and profits, pending a suit for foreclosure.”

⁹⁰ *Post v. Dorr* (1844), 4 Ed. Ch. 412.

⁹¹ *Hollenbeck v. Donnell*, 94 N. Y. 342, at 346.

⁹² *Warren & Co. v. Pitts* (1896), 114 Ala. 65, at 69, 21 So. 494, citing *Scott v. Ware*, 65 Ala. 174; see

First Nat. Bk. v. Illinois Steel Co. (1898), 174 Ill. 140, at 149, 51 N. E. 200; *Hass v. Chicago Bldg. Co.*, 89 Ill. 498, at 502; *Conover v. Grover* (1879), 31 N. J. Eq. 539, at 542.

(c) **American Cases in United States Courts.** It is, of course, competent for the parties to provide in the mortgage for the payment of rents and profits to the mortgagee while the mortgagor remains in possession. But when the mortgage contains no such provision and even when the income is expressly pledged as security for the mortgaged debt, with the right in the mortgagee to take possession upon the failure of the mortgagor to perform the conditions of the mortgage, the general rule is that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he has taken actual possession or until possession is taken in his behalf by a receiver.⁹³

Where mortgaged property was in the hands of a receiver for the owner (a corporation) of the property before the commencement of an action to foreclose, in the absence of a demand by the mortgagee for the rent, it has been held in New York that the receiver of the owner was entitled to collect the rents pending foreclosure.⁹⁴

The United States Circuit Court of Appeals for the Eighth Circuit said, in 1915,⁹⁵ speaking through Sanborn, Circuit Judge, as follows: "Where the mortgaged property of a railroad company is placed in the hands of a receiver before the commencement of a suit to foreclose the mortgage, and a subsequent suit for that purpose is commenced, the proceedings do not impound the income for the benefit of the mortgage bondholders until either a demand has been made of the receivers to surrender the income and the administration of the property, which has been refused, or an intervention has been made in the earlier suit or an application for an order to impound

⁹³ *Freedman, Sav., etc., v. Shepherd* (1887), 127 U. S. 494, at 502, 32 L. ed. 163, citing *Teal v. Walker*, 111 U. S. 242, 23 L. ed. 415; *Grant v. Phoenix Life Ins.*, 121 U. S. 105, at 117, 30 L. ed. 905; *Freedman Sav., etc., v. Shepherd*, 127 U. S. 494, at 503, 32 L. ed. 163, citing *Dow v. Memphis R. Co.*, 124 U. S. 652,

at 654, 31 L. ed. 565; see also *Sage v. Memphis & L. R. R. Co.*, 125 U. S. 361, 31 L. ed. 694; see *Chicago Co. v. United States, etc.* (1915), 225 Fed. 940, at 942.

⁹⁴ *Holly Realty Co. v. Hortmann* (1910), 121 N. Y. S. 572.

⁹⁵ *Chicago, etc., Ry. v. Trust Co.* (1915), 225 Fed. 940, at 942.

the income for the benefit of the bondholders has been made to the court, or the receivership has been extended to the latter suit, or receivers have been appointed therein.”⁹⁶

§ 157. Where Receiver has No Right to Rents and Profits in Mortgage Cases—American Cases in State Courts. Among the states which have passed statutes prohibiting a mortgagee from bringing ejectment and taking possession of the mortgaged property without foreclosure suits are Michigan and California. A line of decisions starting with *Wagar v. Stone*⁹⁷ holds that, “Until the title shall have become absolute in the mortgagee before the foreclosure of the mortgage, the mortgagor has a clear right to the possession and income of the property. And it is not competent to cut short the mortgagor’s right in this regard by means of a receiver appointed in the foreclosure suit. To the same effect is a California decision.”⁹⁸ A Minnesota case,⁹⁹ in 1890, refused to allow a receiver for the rents and profits, but in 1899, *Mitchell, J.*, ruled otherwise, but qualified his decision.¹

Mitchell, J., said: “We have no doubt of the power of a court in a proper case, even under our statute, to appoint a receiver of the rents and profits of the mortgaged premises during foreclosure. Neither do we doubt that this might be done at the instance of the purchaser after sale, and during the year allowed for redemption. But the question is what, in view of the respective rights of a mortgagor and mortgagee, would be a proper case for the appointment of a receiver and for what purpose can a receiver be appointed? As already suggested, no such appointment could be made on the ground that under the mortgage the rents and profits enter into and become a part of the security for the payment of the debt.

⁹⁶ *Chicago, etc., v. United States Trust Co.* (1915), 225 Fed. 940, at 942, citing

⁹⁷ *Wagar v. Stone* (1877), 36 Mich. 364, at 366.

⁹⁸ *Guy v. Ide* (1856), 6 Cal. 99, at 102.

⁹⁹ *Lowell v. Doe* (1890), 44 Minn. 144, 46 N. W. 297.

¹ *Marshall v. Cady*, 76 Minn. 112, at 116, 78 N. W. 978.

Therefore, in our opinion, the only ground upon which a receiver of the rents and profits can be appointed in such a case is the equitable one, that it is necessary to prevent waste and to protect and preserve the premises themselves, and this is the only purpose for which a receivership can be exercised or for which the rents and profits can be used.² The fact that the premises are inadequate security, or that the mortgagor is insolvent, or both combined, is of itself alone no ground for the appointment of a receiver, although it might be a very material consideration in passing upon the propriety or necessity of appointing a receiver for the purpose of preserving the premises. To hold otherwise would be to defeat the provisions of the statute, which gives the right of possession to the mortgagor to deprive him of those substantial rights which it was the evident intent he should have and to allow the mortgagee to do indirectly what he can not do directly.”³

§ 158. Mortgagee Obtaining Receiver Has Prior Right to Rents and Profits—English Doctrine. Until a mortgagee takes possession by himself or a receiver, the mortgagor is in undisputed possession of the property and rents. If a puisne incumbrancer enters into possession or receipt of rents, the mortgagor's possession is displaced, and the puisne incumbrancer can receive the rents without accounting to any prior incumbrancer until that prior incumbrancer intervenes. When he intervenes he displaces the puisne incumbrancer, but until that intervention the puisne incumbrancer is entitled to remain in possession of the rents.⁴

Until an order is made extending a receiver, the incumbrancer who has appointed the receiver is entitled to have the

² Marshall, etc., v. Cady (1899), 76 Minn. 112, at 116, 78 N. W. 978.

³ Marshall, etc., v. Cady (1899), 76 Minn. 112, at 116, 78 N. W. 978; see Lowell v. Doe (1890), 44 Minn. 144, 46 N. W. 297; Wagar v. Stone (1877), 36 Mich. 364; Guy v. Ide, 6 Cal. 99; Cullen v. Minn. L. & T. Co.

(1895), 60 Minn. 6, 61 N. W. 818; Travelers Ins. Co. v. Brouse (1882), 83 Ind. 62.

⁴ The Agra Bank v. Barry (1869), 3 Irish Reports Equity, 443, at 450; In re Metropolitan, etc. (1912), 11 Ch. D. 501; Post v. Dorr (1845), 4 Ed. Ch. (N.Y.) 412.

rents received, applied in payment of his demand, irrespective of the priority, as being realized by his superior diligence but when once the receiver is extended, then the rents must be applied according to the priorities of the incumbrancer.⁵

§ 159. Mortgagee Obtaining Receiver Has Prior Lien on Rents and Profits—American Doctrine. Unless expressly stated, the mortgagee has no specific lien on the rents and profits until condition broken.⁶ Ordinarily a receiver distributes property and funds *pari passu* among all those who become parties to the proceeding and the party at whose instance a receiver is appointed has no advantage over the others.⁷ But the mortgagee or other lienholder at whose instance a receiver is appointed secures an equitable lien on the unpaid rents and profits⁸ of the mortgaged property which is binding until other lienholders are made parties to the suit. Thus a plaintiff in a suit to foreclose a mortgage as far as the rents and profits are concerned gets an equitable lien on them before judgment.

The substance of the rulings in the United States is that until the mortgagee asserts his rights under the mortgage to the possession of the property by filing a bill of foreclosure, or if the properties be in the hands of a third party, by demanding possession of such party the mortgagee has no right to its earnings and profits.⁹ The taking possession by a receiver on behalf of a mortgagee entitles the mortgagee to the rents and profits of the property even where the income is not expressly pledged as security for the mortgage.¹⁰

⁵ *The Agra Bank v. Barry* (1869), 3 Irish Reports Equity, 443, at 450; *Saunders v. Lord Lisle* (1869), Irish Reports 4 Eq. 43; *Post v. Dorr* (1845), 4 Ed. Ch. (N. Y.) 412.

⁶ *Bank v. Arnold*, 8 Paige 38; *Teal v. Walker* (1883), 111 U. S. 242, at 250, 23 L. ed. 415; also *Wash. Ins. Co. v. Fleischhauer*, 17 N. Y. Sup. Ct. 117; *Howell v. Ripley*, 10 Paige, ch. 43; see *Williamson v.*

Gerlach (1885), 41 Ohio St. 682, at 684.

⁷ *Williamson v. Gerlach* (1885), 41 Ohio St. 682, at 684.

⁸ *Rider v. Bagley* (1881), 84 N. Y. 461, at 465.

⁹ *United States T. Co. v. Railway* (1893), 150 U. S. 287, at 308, 37 L. ed. 1085.

¹⁰ *Freedman's Sav. Co. v. Shepherd* (1887), 127 U. S. 494, at 502, 32 L. ed. 163.

§ 160. Receiver of Rents and Profits Entitled to Rents in Arrears. Nothing is now more clear than that a mortgagee is not, as against the mortgagor, entitled to an account of bygone rents collected;¹¹ and it is also clear that a receiver when appointed by this court is entitled to all the rents then in arrears¹² and accruing since the appointment.¹³

It is well settled that in certain cases the court of chancery will appoint a receiver of lands mortgaged and will restrain the mortgagor or his grantee from collecting the accrued rents, unpaid by the tenant as well as future rents.¹⁴

§ 161. Receiver over Mortgaged Property in Absence of Mortgagee. It is said that a receiver can not be put upon the estate to the prejudice of the first mortgagee, but the order may be made as between the mortgagor and the second mortgagee without prejudice to the right of the first mortgagee to take possession whenever he thinks fit to do so.¹⁵

The appointment of a receiver is a matter which does not concern mortgagees or prior incumbrancers, for a receiver in the exercise of his authority will be obliged to respect former orders of the court and the prior incumbrancers will be at liberty to take such proceedings on behalf of their own interests as they may think fit.¹⁶

When the property over which a receiver is claimed is in mortgage, it is no objection that the mortgagees are not

¹¹ Lord Langdale, M. R. (1838), *Codrington v. Johnston*, 1 Beav. 520, at 524; *Noyes v. Rich* (1862), 52 Me. 115, at 117.

¹² *Rider v. Bagley* (1881), 84 N. Y. 461, at 465; Lord Langdale, M. R. (1838), *Codrington v. Johnston*, 1 Beav. 520, at 524; see also *Howell v. Ripley*, 10 Paige 43; *Astor v. Turner*, 11 Paige 436; *Mitchell v. Bartlett*, 51 N. Y. 447; *Argall v. Pitts*, 78 N. Y. 242.

¹³ *Conover v. Grover* (1879), 31 N. J. Eq. 539.

¹⁴ *Lofsky v. Mayer*, 3 Sandf. Ch. (N. Y.) 69; see *Ball v. Improved Prop. Hold. Co.* (1915), 220 Fed. 637.

¹⁵ *Dalmer v. Dashwood* (1793), 2 Cox Eq. Cases, 378.

¹⁶ *Bryant v. Bull* (1878), 10 Ch. D. 153.

before the court, for their rights will not be prejudiced by the order.¹⁷

Generally where all necessary parties are not before the court it seems that a receiver may be appointed if the appointment can not prejudice their interests.¹⁸

Lord Eldon said, "Supposing it to be clear that there was a cause for injunction (and receiver) and that the injunction would operate for the benefit of the parties not before the court, I am far from thinking that the court would on account of the absence of those parties hesitate to do what it could for them."¹⁹

A receiver will be appointed *pendente lite* where the non-resident owner of mortgaged property who is receiving the rents refuses to pay the interest due upon incumbrances and where the property being in itself inadequate security is the only resource for the collection of the mortgaged debt. It was clearly the duty of the defendant to keep down the interest upon the incumbrances. Unless this was done, the plaintiff would himself be obliged to pay the prior incumbrancers in order to prevent foreclosure.²⁰

In the nonpayment of taxes, the probable cancellation of insurance and the cessation of the use of the property for hotel purposes, resulting as may be considered in a permanent impairment of the value and to the ultimate loss of the holder of mortgage grounds for appointment of receiver.²¹

§ 162. Effect of Rents and Profits Clause in Mortgage in United States. (a) In Michigan. In a case wherein the mortgage contained a clause which in case of default gave the

¹⁷ *Dalmer v. Dashwood* (1793), 2 Cox Eq. Cases 378, at 382; *Norway v. Rowe* (1812), 19 Ves. 144; *Smith v. Egan* (1837), San. & Sc. 238; *Wells v. Kelpin* (1874), L. R. 18 Eq. 298; *Bryant v. Bull* (1878), 10 Ch. D. 153.

¹⁸ *Hamp v. Robinson* (1865), 3 De G., J. & S. 97, 109 C. A.; *Holmes v. Bell* (1840), 2 Beav. 298; *Const. v. Harris, Turn. & R.* 514.

¹⁹ *Const. v. Harris, Turn. & R.* 496, at 514.

²⁰ *Haughan v. Netland*, 51 Minn. 552, 53 N. W. 873, citing *Schreiber v. Carey*, 48 Wis. 200, 4 N. W. 124; *Gale v. Carter* (1910), 154 Ill. App. 478.

²¹ *Lowell v. Doe* (1890), 44 Minn. 144, 46 N. W. 297.

mortgagee either in person or by an attorney or other agency the right to take possession and operate the works and mines or cause them to be operated, the court in construing this clause said, "Courts usually enforce agreements when in accordance with and not in violation of the well-settled statutory policy of the state."²² And later on the same question:²³ "It has never been the policy of our law to divest the mortgagor of possession until foreclosure and the expiration of the period of redemption; and while we think it within the power of the parties to stipulate that such possession and management of the business may precede foreclosure and that in such case a court of equity may enforce specifically such an engagement, yet such power should be exercised with a full recognition of the settled policy of this state, and should not be exercised except in a case where the right is clearly by the engagement of the party."²⁴

(b) **In Illinois.** By the express possession of a deed of trust, the mortgagors waived their right to retain possession after any default in payment or after breach of any of the covenants of the deed. It also provided that the legal holders of the notes might file a bill in any court having jurisdiction to obtain a decree for the sale of the property and that the court might appoint a receiver to collect the rents during the pendency of the suit. Nothing more has been done than the parties stipulated for in their deed. The effect of the deed was to pledge the rents for the payment of the debts as fully as the property itself and to make the pledge effectual, the appointment of a receiver to collect them was stipulated for. Such a provision in the mortgage created a valid lien on the rents which equity will enforce without regard to the question of insolvency of the mortgagors.²⁵

²² Beecher v. M. & P., etc. (1879), 40 Mich. 307.

²³ Michigan Trust Co. v. Lumber Co. (1894), 103 Mich. 392, 61 N. W. 668.

²⁴ Michigan Trust Co. v. Lumber Co. (1894), 103 Mich. 392, at 402,

61 N. W. 668; for a case under the statutes of Minnesota, see Cullen v. Minnesota L. & T. Co. (1895), 60 Minn. 6, 61 N. W. 818.

²⁵ Bagley v. Illinois T. & S. D. (1902), 190 Ill. 76, at 78, 64 N. E. 1085.

§ 163. Mortgagee Intervening in Receivership Proceedings. See Chapter XXVII, "Intervention and Presentation of Claims," sec. 750.

§ 164. Mortgagor Intervening in Receivership Proceedings. See Chapter XXVII, "Intervention and Presentation of Claims," sec. 750.

SUITS TO ENFORCE A RENT CHARGE AND ANNUITIES

§ 165. Definition of Rent Charge. A rent charge is a grant by one person to another of an annual sum of money payable out of certain lands in which the grantor may have any estate.²⁶ In ancient times it was necessary in every grant of a rent charge, to make the grant effective, to give an express power to the grantee to distrain on the premises out of which the rent charge was to issue. If this power were omitted, the rent was merely a rent seek.

The power to distrain has been attached by parliament²⁷ to rents as well as to rents service.

§ 166. Definition of Annuity. The right created by an instrument, whether deed, will, codicil, or statute, to receive a definite annual sum of money, is an interest which may be called an annuity, and in the nature of personal estate, when the source from which the money is directed to be paid in personal estate other than leaseholds.²⁸ It will be found, however, that the English and American decisions do not often recognize the fine distinction between rent charge on real estate and annuity, a charge on personal estate, but the courts often use the term synonymously for the right to receive an annual sum of money.

§ 167. Distinction between Rent Charge and Annuity. The right created by an instrument, whether deed, will, codicil or

²⁶ Williams on Real Property, D. 925; 8 Bing. 92; 2 C. W. & J. 486; Litt. 270.

²⁷ Geo. II, ch. 38, 75; see 2 Q. B.

142; 2 Tyr. 1.

²⁸ Halsbury's Laws of England, Rent Charge, p. 465.

statute, to receive a definite annual sum of money is an interest which may be, strictly speaking, either a "rent charge" or annuity. If the only source from which the amount is directed to be paid be freeholds or copyholds, the interest is a rent charge and is in the nature of real estate. If the only source from which the money is directed to be paid be personal estate other than leaseholds the interest is an annuity and is in the nature of personal estate. If lastly, the only source from which the money is directed to be paid be leaseholds the interest may be properly described as a rent charge, and is a chattel real in the nature of personal estate.²⁹

§ 168. Receiver to Enforce a Rent Charge. A charge may be by special contract imposed upon land³⁰ or other property or it may be imposed by order of court.³¹ Such charges prevailed before the English Judicature Act of 1873 and after this act.³²

Before the Act of 1873 a party holding a charge on property by contract and also a party holding a charge by judgment could come into a chancery court and institute a separate suit to make his charging order available. The purpose of the Judicature Act of 1873 seems to have been to give the high court of justice all the remedies or relief claimed in any action which before the passing of the act could have been given by a court of law and by a court of equity coming to the assistance of a court of law.³³ It does not seem to have materially enlarged the original powers of a court of chancery respecting charging orders. The purpose of obtaining this order was to realize the property and have it applied to the plaintiff's claim. In the case of a rent charge on real estate belonging to someone other than the defendant, and in the

²⁹ Halsbury's Laws of England, Rent Charge, p. 465.

³⁰ Bouvier's Law Dictionary.

³¹ Curling v. Marquis of Townshend, 19 Ves. 628, at 633.

³² Leggott v. Western, 12 Q. B. D. 287.

³³ Leggott v. Western, 12 Q. B. D. 287.

case of a charge against shares or stock in an incorporated company the property being in the possession of someone other than the defendant, ordinary execution will not ordinarily lie.

If the creditor in endeavoring to enforce his charge finds that the estate is protected by circumstances respecting a prior title he may apply for a receiver.³⁴

§ 169. Receiver to Enforce an Annuity in England. Since the passage of the statute of George II which gave the right of distress to the holder of an annuity or rent charge even if it were not in the instrument or deed of settlement, there are few cases in England wherein the court has appointed a receiver to collect annuities for the simple reason that the holder of the annuity has the right to enforce his right by an action at law.³⁵ However, where a case presents itself where a mortgagee of a legatee wishes to enforce an equitable charge, he is in the position of an equitable mortgagee³⁶ and has a right to a receiver because he can not enforce his right by an action at law.

§ 170. Receiver to Enforce an Annuity in Ireland. In Ireland the courts seem to be more disposed to appoint a receiver to collect a rent charge than do the English courts and go so far as to hold that in annuity cases courts of equity have concurrent jurisdiction with the courts of common law,³⁷ and would appoint a receiver where there were questions which could, at least, be raised in a court of law, which might interfere with the right of the plaintiff to recover.

§ 171. Receiver to Enforce an Annuity in America. A bill was filed by a father to set aside on account of duress a

³⁴ Curling v. Marquis of Townshend, 19 Ves. Jr. 629, at 633; Garfitt v. Allen (1887), 37 Ch. D. 48, at 50.

³⁵ Buxton v. Monkhouse, G.

Cooper, 41; Sallory v. Leaver (1869), L. R. 9 Eq. 22, at 25.

³⁶ Garfitt v. Allen (1887), 37 Ch. D. 48, at 50.

³⁷ Beamish v. Austin, Ir. Rep., 9 Eq. 361; see other Irish Cases.

conveyance to his children of all his property, valued at \$45,000 by which he reserved to himself an annuity of \$1,200 which had not been paid, but had been withheld by the defendants from the commencement of the suit and on which he depended wholly for support. Held that unless the arrears of the annuity were paid, a receiver would be appointed, and that before answer filed and notwithstanding the allowance of a demurrer to the action which, however, was only for a defect as to parties.³⁸

³⁸ *Probasco v. Probasco* (1878), 30 N. J. Eq. 108.

CHAPTER X

RECEIVERS IN MISCELLANEOUS CASES

ANALYSIS

- § 172. Receiver where Payment is to Be Made Out of Particular Fund.
- § 173. Receiver on the Ground of Fraud.
- § 174. Receiver on the Ground of Insolvency.
- § 175. Receiver after Assignment.
 - (a) Receiver after Assignment Not Filed in Court.
 - (b) Receiver after Assignment Filed in Court.
 - (c) Receiver after Assignment when Court Has Given Directions.
- § 176. Receiver in Creditors' Suits before Judgment.
- § 177. Receiver in Equity Suit to Preserve Local Assets in Aid of Foreign Suit.
- § 178. Receiver to Preserve Perishable Property.
- § 179. Receiver for Property about to Be Removed from Jurisdiction.
- § 180. Receiver to Preserve Crop.
- § 181. Receiver when Mortgagor or Trustee Fails to Pay Delinquent Taxes.

§ 172. Receiver where Payment Is to Be Made Out of Particular Fund. Said Lindley, M. R., in 1898: "Quite independently of the English Judicature Act of 1873 if a plaintiff had a right to be paid out of a particular fund he could in equity obtain protection to prevent that fund from being dissipated so as to defeat his rights. He might not have had a specific charge on the fund, so as to give him priority, but after a long series of decisions—there was some doubt about it at one time—the court settled that a person who had a right to be paid out of a particular fund could obtain an injunction (and if an injunction is followed on principle that he could obtain a receiver) in a proper case to protect the fund from being misapplied. That is the principle upon which

the learned judge has acted here—a perfectly sound principle even without invoking the aid of sec. 25 of the Judicature Act.”¹

Vague allegations of peril to the property or fund are not sufficient; there must be a distinct averment in the bill of the insolvency of the debtor (and of his fraudulent grantee, if property is being fraudulently disposed of) or that the property in question is of such a nature and character as to be readily spirited away and that the same is being disposed of or that irreparable loss would result from the delay that would follow giving notice, if notice were dispensed with,² or some allegations equally definite upon which the court may order receivership. There is no case in which the court appoints a receiver merely because the measure can do no harm and still less when the trustee is such under the appointment of a testator.³

It has been held that a landlord, the owner of a license, has sufficient prima facie interest in the business of keeping a hotel open to entitle him to the appointment of a receiver of the license to secure its preservation pending the litigation by the landlord to recover possession for breach of covenant.⁴

§ 173. Receiver on the Ground of Fraud. Chancery courts grant relief on the principles of equity, good conscience and honesty, and in doing so grant relief against fraud. However, that the defendant has been guilty of fraud will not of itself enable the plaintiff to have a receiver appointed over the defendant's property.

Fraud, or an effort to violate or disregard the injunction of the court, is ground for the appointment of a receiver.⁵

¹ *Cramer v. Perkins Lindly*, M. P. (1899), C. A., 1 Ch. 20; *Kearns v. Leaf*, 1 H. & M. 681, at 707; *Parkhurst v. Kinsman*, 18 Fed. Cases No. 10760; *Bigbee v. Summer*, 101 Ga. 201, at 205, 28 S. E. 642; see *Title Ins. Co. v. Grider* (1898), 152 Cal. 746, 94 Pac. 601.

² *Gilreath v. Union Bank*, 121 Ala. 204, 25 So. 581.

³ *Orphan's Asylum Society v. McCarter*, 1 Hopk. 429.

⁴ *Teney & Sons, Ltd. v. Callingham* (1908), 1 K. B. 82.

⁵ *Hancock v. Am. P. & T. Co.*, 86 Ill. App. 630; *Durand & Co. v. Howard & Co.* (1914), 216 Fed. 585, at 587.

It is well settled that when there is reasonable ground to apprehend that, pending the litigation, property, the subject of it, will be disposed of fraudulently, or in such way as to deprive the complaining party of the fruit of his recovery, when had, a court of equity will secure the property, or in a proper case, have it sold and secure the fund arising from it, by the appointment of a receiver, or by injunction, and when need be, both, until the action shall be tried upon its merits.⁶

When a creditor's bill alleges that the debtor, a merchant, is insolvent; that he has transferred to M, his mother, for a stipulated debt, a part of his goods, which were taken possession of by her and were being disposed of by W, acting as her agent; that the debtor had made an assignment of the rest of his property to said W for the benefit of his creditors; that W, who was insolvent and acting without bond, was disposing of the goods assigned to him, and had prepared a large simulated claim; that since the sale to M, new goods which had been assigned to the debtor before the sale, and were not included therein, were turned over to W as the agent of M; that both M and W had notice of the debtor's insolvency at the time of the sale and assignment, and that the entire transaction was a scheme to defraud the complainant and other creditors. Held that the appointment of a receiver without notice was not improper.⁷

Although fraud generally is a matter cognizable by a court of equity, nevertheless, in certain cases where fraud can be shown, attachment may be had by statutes of many states.

It has been ruled by the Supreme Court of Alabama⁸ that the fact that the directors and officers of a corporation are fraudulently misappropriating the assets of the company will not alone of itself constitute ground for the appointment of a receiver. If they are solvent, they can be brought to an

⁶ Ellett v. Newman, 92 N. C. 519.

⁸ Alabama Coal & C. Co. v. Shack-

⁷ Maxwell v. Peters Shoe Co., 109 Ala. 371, 19 So. 412.

elford, 137 Ala. 224, 34 So. 833.

accounting which will afford complete relief and is therefore an adequate remedy.⁹

§ 174. Receiver on the Ground of Insolvency. The court appoints a receiver to protect property as a matter of discretion. There are, however, certain general principles by which the court's exercise of discretion is governed. As a general rule it would be safe to say that when insolvency of the defendant is alleged and not denied upon the hearing of the application and it is made to appear that there is danger that the assets will be misappropriated or wasted, a receiver should be appointed.¹⁰ In such a case insolvency is a contributing cause rather than a sole ground.

Nor does the fact that the defendant, in possession and receiving the rents and profits, is insolvent at all affect the rule that whenever the contest is simply a question of disputed title to the property, the court of equity will not interfere. There are exceptions to this general rule, but they are only where the relief is granted upon special circumstances of an equitable nature appealing strongly to the conscience of the court. The farthest the courts have ever gone in taking jurisdiction to appoint a receiver in actions of ejectment against a tenant in possession of real property, is where the plaintiff shows a probable title and danger of the rents being lost.¹¹

§ 175. Receiver after Assignment. (a) Receiver after Assignment Not Filed in Court. If a mortgagee has the right to foreclose the mortgaged premises and it appears that the property is an insufficient security for the payment of the debt the mortgagor may ask for a receiver to collect the rents and profits or operate the concern. Then there is no reason why he could not have a receiver after the mortgagor has made an assignment. An assignment for creditors can not

⁹ *Hayes v. Jasper Land Co.*, 147 Ala. 340, 41 So. 909.

¹⁰ See cases under receivers of

trustees; see cases under receivers of corporations.

¹¹ *Rollins v. Henry*, 77 N. C. 467.

affect the rights of creditors who are secured by liens acquired prior to the assignment.¹² The above propositions hold good when the assignment has not been filed in court agreeable to statutes therein providing.

(b) Receiver after Assignment Filed in Court. Many states have statutes providing that assignments for the benefit of creditors may or shall be filed in certain courts. When such an assignment has been duly executed and properly filed the question presents itself. Has the court wherein such assignment is filed obtained such possession of the res as to exclude other courts from appointing a receiver of such res?

Lurton, J.¹³ discussing the Kentucky statute says: "While an administrator and a receiver are officers of the court appointing them and their possession is the possession of the court, an assignee under the Kentucky statute is not in possession for any court, but holds under the deed appointing. This has been often settled in reference to similar assignment under like statutes as to be no longer open to debate (Statutes of Pennsylvania,¹⁴ statutes of Ohio,¹⁵ and statutes of Michigan¹⁶).

(c) Receiver after Assignment when Court Has Given Directions. The Kentucky statutes covering assignments for the benefit of creditors gave authority to the assignee to apply by petition to the court wherein the assignment was filed for direction in the conduct of his trust and for the settlement of his accounts. The petition by the assignee did not change the character of his possession. He remained in possession of the res after he filed the petition as assignee under the deed, and not under any appointment by or authority from the court wherein it was filed. That court did not take possession of any part of the assets. The pendency of the suit did not place the property in gremio legis.¹⁷

¹² Sweet, etc., v. Union Nat. B. (1897), 149 Ind. 305, at 307, 49 N. E. 159.

¹³ Powers v. Blue Grass B. & L. Co. (1898), 86 Fed. 705, at 709.

¹⁴ Shelby v. Bacon (1850), 10 How. 56, 13 L. ed. 326.

¹⁵ George T. Smith Middlings, etc., v. McGroarty (1890), 136 U. S. 237, 50 L. ed. 1176.

¹⁶ Ball v. Tompkins (1890), 41 Fed. 484; Morris v. Lindauer (1893), 54 Fed. 23.

¹⁷ Powers v. Blue Grass B. & L. Co. (1898), 86 Fed. 705, at 709.

The same question came up under the Ohio statute¹⁸ in 1915 and the same court though differently constituted held that under the facts therein stated the court in Ohio wherein the assignment was lodged did not get possession of the res by reason of the assignee having asked for instruction from the Ohio court.¹⁹

§ 176. Receiver in Creditors' Suits before Judgment. Creditors without lien or title and who have not reduced their claims to judgment have as a general rule no right to invoke interference by injunction and receiver to prevent the assignment of the debtor's goods or to deprive the debtor or his assignee of possession.²⁰ This rule holds as to debts not due as well as to those past due.²¹

It has been held, however, that where debtors are beyond the jurisdiction, their creditors numerous, their assets within the jurisdiction of the court in the shape of money and credits; many of those indebted to them unknown and therefore not to be reached by garnishment and where they have an agent within the jurisdiction of the court cognizant of all the debtors within the jurisdiction, and where conflicting claims among different creditors touching equitable priority are to be settled, the remedy for creditors by bill, injunction and the appointment of a receiver is more ample and complete, certainly more safe than the remedy at law by attachment.²² Another exception to the rule refusing an ordinary nonjudgment creditor a receiver is found in the Virginia Circuit Court of the United States.²³

¹⁸ Ohio General Code, sec. 1613.

¹⁹ Collins v. Williamson (1915), 229 Fed. 59.

²⁰ Maxwell v. McDaniels (1910), 184 Fed. 311, citing Smith v. Railway Co., 99 U. S. 368, 25 L. ed. 347; Hollins v. Brierfield C. & Iron Co., 150 U. S. 377, 37 L. ed. 1113;

see Weis v. Goetter, etc. (1882), 72 Ala. 259, under Alabama statute.

²¹ Johnson v. Farnum (1876), 56 Ga. 144.

²² Ballin v. Feist, 55 Ga. 546.

²³ Fink v. Patterson (1884), 21 Fed. R. 602.

§ 177. Receiver in Equity Suit to Preserve Local Assets in Aid of Foreign Suit. It is an ancient head of the jurisdiction of the court of chancery to interfere in aid of the jurisdiction of other courts. It interferes with respect to execution under judgments at law and with respect to suits in the ecclesiastical court as to probate or administration by appointing a receiver *pendente lite*.²⁴ Suits may also be instituted in a local court to protect local property when a suit in a foreign court is pending to determine what interest the plaintiff has in such property. The local suit should ask for some relief which the local court may give but at the same time may ask for an injunction restraining the defendant from taking the subject of the litigation out of the jurisdiction and for a receiver.²⁵

§ 178. Receiver to Preserve Perishable Property. Equity has power to preserve pledged property from destruction so that it may be available to respond to the rights of the pledgee when his right to the pledge crystallizes. Equity may intervene to protect pledged property by injunction or otherwise before the debt becomes due.²⁶ If an injunction is not sufficient protection the court may order the property taken possession of by a receiver and sold and the proceeds held in court for distribution according to the respective rights of the parties as they may be ascertained.²⁷ The appointment of a receiver for a building in course of erection is proper upon application of one who files a bill for a mechanic's lien (under the Illinois practice) where it appears that it is likely to be the subject of protracted litigation. And a receiver

²⁴ *Brenan v. Preston*, 2 De G., M. & G. 813, at 839.

²⁵ *The Transatlantic Company v. Pietroni*, Pt. I (1860), 1 Johnson (English) 604, 6 Jur. (N.S.) 532.

²⁶ *Long Dock v. Mallery* (1858),

12 N. J. Eq. 431; *Harned v. Rowand* (1908), 69 Atl. 181.

²⁷ *Long Dock v. Mallery* (1858), 12 N. J. Eq. 93; *Long Dock v. Mallery* (1858), 12 N. J. Eq. 431; *Harned v. Rowand* (1908), 69 Atl. 181.

has even been empowered under extraordinary circumstances to complete the building.²⁸

§ 179. Receiver for Property About to Be Removed from Jurisdiction. Where plaintiff sued for rents due him and asserted a landlord's lien, he also alleged that the tenant was insolvent and was about to take the assets beyond the plaintiff's reach. The Court of Civil Appeals of Texas held that the lower court was right in appointing a receiver and that the right to a receiver in that case did not rest alone on equity, but on a statutory right under the facts alleged and proved.²⁹ A suit for rents is a common-law action, but the fact that the plaintiff had some lien on the assets would give him a right to subject such assets to his claim and in such a case a receiver might be appointed.

§ 180. Receiver to Preserve Crop. After a landowner has obtained judgment for the restitution of the premises and an appeal is taken, if the court upon a hearing that the crop ought to be preserved so that the person finally found to be entitled to them could have them, such court may appoint a receiver to preserve the crop. In lieu of appointing a receiver the court may require a bond from the party appealing and in possession.³⁰

§ 181. Receiver when Mortgagor or Trustee Fails to Pay Delinquent Taxes. When property is mortgaged and when taxes are allowed to go unpaid and when such a default is cause for foreclosure of the mortgage, and when a foreclosure suit is brought either by the trustee of the mortgagee, or upon his failure to bring suit then by one of the bondholders, a receiver may be appointed to pay the delinquent taxes, keep up insurance and to protect the property.³¹

²⁸ Chicago Title & T. Co. v. Chapman (1907), 132 Ill. App. 55.

²⁹ Bond & Reed H. Co. v. Walsh (1916), 181 S. W. (Tex. Civ. App.) 248.

³⁰ Parsille v. Brown (1915), 188 Mich. 485, 154 N. W. 569.

³¹ Young v. Hamilton (1910), 135 Ga. 339, 69 S. E. 593.

CHAPTER XI

RECEIVERS AFTER JUDGMENT PENDING REVIEW

ANALYSIS

- § 182. Preservation of Property Pending an Appeal.
- § 183. Effect of Review in Upper Court on Interlocutory Orders.
- § 184. Effect of Final Judgment on Status of Receiver.
- § 185. Interlocutory Orders Appointing Receiver Not Generally Appealable.
- § 186. Interlocutory Orders Appointing Receiver Appealable by Statute.
- § 187. Order Appointing Receiver, when Reviewable on Error Proceedings.
- § 188. Receiver Appointed Pending Appeal.
- § 189. Practice of Appointing Receiver on Appeal.
- § 190. Receiver Appointed by Upper Court.

§ 182. Preservation of Property Pending an Appeal. Where a decree had been rendered in a district court of the United States affecting property in litigation and the court has jurisdiction of the subject-matter, and an appeal is taken to the Supreme Court of the United States, as the property in controversy is not brought into the appellate tribunal, but remains in the custody and care of the court below, it is agreed that full power exists in that court, pending the appeal, to adopt all proper and judicious measures to protect and preserve it from waste or loss.¹ Under certain conditions when the res in litigation has been sold by the lower court, such court pending an appeal may order the proceeds invested.²

The general jurisdiction of a court to protect and preserve the property which is the subject of the litigation is a collateral

¹ *Bronson v. La Crosse R. Co.* (1863), 1 Wall. 405, at 410, 17 L. ed. 725.

² *Spring v. South Carolina Ins. Co.* (1821), 6 Wheat. 518, 5 L. ed. 320.

question in no way involving the issues presented on appeal and in such a case if there is no statutory objection, the lower or trial court pending an appeal will appoint a receiver in a proper case for the preservation of the property which is the subject of the action.³

§ 183. Effect of Review in Upper Court on Interlocutory Orders. An exhaustive examination of the question whether an appeal from an order dissolving an injunction suspended the order, so as to have the injunction free pending the appeal, was gone into at length by Chancellor Walworth of New York.⁴ "The effect of an appeal after the proper steps have been taken, to render it a stay of proceedings upon the order or decree appealed from, is to leave the proceedings in the same situation as they were at the time of perfecting such appeal, but not as they were before the order or decree appealed from was entered. If the order appealed from was an order granting an injunction, the same is not dissolved by the appeal, so as to authorize a party to proceed in violation of the injunction pending such an appeal, although the present or immediate power of the court to punish the party for a breach of the injunction pending the appeal would perhaps be suspended until such appeal was disposed of by the appellate court. And where the appeal is from an order dissolving an injunction, such injunction is wholly inoperative, and can not have the effect to restrain the proceedings which were formerly enjoined until such order is reversed upon the appeal so as to restore the binding force of the injunction."⁵

A motion for a receiver to take charge of the property and in view of the perishable character of some of it, for an order for its sale, if proper to be made during the pendency of the

³ Mitchell v. Roland (1895), 95 Iowa 314, 63 N. W. 606; Young v. Germania S. Bk. (1909), 133 Ga. 699, 68 S. E. 321; O'Neill v. Kilduff (1908), 81 Conn. 116, 70 Atl. 640.

⁴ Hart v. Albany (1832), 3 Paige 381.

⁵ Graves v. McGuire (1837), 6 Paige, 378.

litigation, is within the jurisdiction of the court below and not of the appellate court.⁶

The filing of a petition in error and the execution of an undertaking for a stay of execution do not discharge interlocutory orders made for the preservation of property or the protection of the interests of parties during the pendency of the litigation and the jurisdiction to make such orders during the pendency of the proceedings in error remains in the court below. The petition in error does not bring the whole cause before the appellate court, but only the order or judgment which is complained of and leaves in the court below all jurisdiction in the cause not inconsistent with the power to reverse, vacate or modify the final order or judgment in which error is alleged.⁷

A less drastic measure than the appointment of a receiver pending a review of a case is a bond given by the party appealing that he will hold the party in whose favor judgment is given harmless, and that such party will suffer no waste in respect to the property pending the review and further that the party remaining in possession of the premises will account to the holder of the judgment in case the case in the upper court shall go against the party appealing.⁸

It is well settled that the granting of an appeal and approving the appeal bond by the court does not warrant the court which appointed the receiver in ordering the receiver to turn over the property to the original defendant.⁹

§ 184. Effect of Final Judgment on Status of Receiver. The appointment of a receiver is a provisional remedy in the action and ancillary to it. It is made by the court in the exercise of the discretionary powers not as a matter of strict

⁶ *Goode v. Wiggins* (1861), 12 O. S. 341, at 343.

⁷ *Goode v. Wiggins* (1861), 12 O. S. 341.

⁸ *Parsille v. Brown* (1915), 154 N. W. 569.

⁹ *State, ex rel., v. Reynolds* (1907), 209 Mo. 161, at 176, 107 S. W. 487.

right but purely as a matter of protection to the plaintiff and is entirely independent of the judgment from which plaintiff appealed and which so far as the court is concerned, is a final determination of the rights of the parties.

According to the current authorities the entry of the judgment in favor of the defendant in the main action has the effect of ending the function of the receiver, but the receiver is not discharged thereby. The court may according to the exigencies of the case upon good cause shown, either continue or discharge him by further order.¹⁰ The entry of a final judgment or the abatement of the action does not discharge the receiver ipso facto. Although as between the parties his functions terminate with the determination of the suit, he is still amenable to the court as its officer until he has complied with its direction as to the disposition of the funds he has received as receiver.¹¹

§ 185. Interlocutory Orders Appointing Receiver Not Generally Appealable. An order appointing a receiver is merely for the purpose of taking possession of property in litigation and managing it for the interest of all parties is in its very nature interlocutory, no matter at what stage of the cause it may be made. Such orders can not ordinarily be appealed from directly. Such orders, however, as well as all other proceedings in a chancery cause, are brought up for revision by a general appeal but remain in force unless otherwise ordered.¹²

§ 186. Interlocutory Orders Appointing Receiver Appealable by Statute. Except by statute neither the circuit court of appeals nor the Supreme Court of the United States

¹⁰ Ireland v. Nichols (1870), 40 How. Pr. 85.

¹¹ Baughman v. Superior Ct. (1887), 72 Cal. 572, 14 Pac. 207.

¹² Enochs v. Willson (1883), 11 Lea (Tenn.) 228; see ch. XXV, sec. 692.

has jurisdiction to review by writ of error or appeal any order, judgment or decree or appeal which is not final.¹³

However, by special statute,¹⁴ an interlocutory order or decree granting or continuing, refusing or dissolving, or refusing to dissolve an injunction in equity or appointing a receiver in a district court, may be appealed from in a case in which an appeal from a final judgment may be taken to the circuit court of appeals, on appeal, provided the appeal be taken within thirty days from the entry of such order or decree.

A number of the code states have statutes providing for appeals from interlocutory orders appointing or refusing to appoint receivers.¹⁵

§ 187. Order Appointing Receiver when Reviewable on Error Proceedings. The appointment of a receiver is an equitable proceeding and such proceedings are generally reviewed by appeal and not by proceedings in error to correct errors of law, nevertheless we had in Ohio under the constitution and statutes¹⁶ as they existed before the amendment of 1913, a supreme court decision which permitted a review in error proceedings of an order of court appointing a receiver.¹⁷ Whether such a review will lie under the constitution as it exists today has not been decided.

§ 188. Receiver Appointed Pending Appeal. After a final decree in a cause confirming a sale of land and awarding a writ of assistance to put the purchaser in possession, from which the defendant in possession of the land had prayed and obtained an appeal, the court may, upon the application of the purchaser, at the same term and on good cause shown, set

¹³ *McLish v. Roff*, 141 U. S. 661, 35 L. ed. 893; *Chicago, St. Paul, etc., v. Roberts*, 141 U. S. 690, 35 L. ed. 905.

¹⁴ 26 United States Stat. at L. 828, par. 7; 31 Stat. at L. 660.

¹⁵ See Code of Alabama (1896), pars. 429 and 800; see ch. XXV.

¹⁶ Ohio General Code (1910), sec. 12258 (R. S. sec. 6707); Code 1853, sec. 512.

¹⁷ *C. S. & C. R. R. Co. v. Sloan* (1876), 31 O. S. 1.

aside the sale and appoint a receiver to take possession of the land pending the appeal, and the insolvency of the party in possession is sufficient cause. After the entry of the order appointing a receiver, the court may grant the order praying for an appeal.¹⁸

After a decree for the sale of real estate to satisfy creditors having liens thereon, and an appeal from that decree, the court below in which the suit was pending may appoint a receiver and take possession of the property and rent it out and collect the rents until the further orders of the court.¹⁹

“A suit having been appealed to the Supreme Court of Indiana may be regarded as yet pending for the purpose of an application for a receiver of the rents and profits, and we think the court that rendered the decree appealed from was the proper court to hear and determine such an application, whether the application be made by motion or petition, or in the form of a complaint, is under the code practice of Indiana, immaterial in such a case.”²⁰

§ 189. Practice of Appointing Receiver on Appeal. In a suit certain goods were attached, and by the defendant giving bond were left with the defendant. He sold them subsequently, a judgment in the attachment suit was obtained and a receiver appointed to take charge of the goods to satisfy the judgment. Pending an appeal for the judgment to which the complainant was not a party, complainant filed a bill in equity to restrain the receiver from interfering with the property.

In such a case the remedy of the party to the cause who conceives the appointment to be oppressive, or the management of the property by the receiver to be legally objectionable, is to apply to the supreme court, inasmuch as the appeal

¹⁸ *Merrill v. Elain* (1875), 2 Tenn. Ch. 513; see *Bidwell v. Paul* (1875), 5 Baxt. 693; *Doughty v. Somerville*, 3 Halst. Ch. 629 (injunction); *Ryerson v. Boosman*, 3 Halst. Ch. 640 (injunction), and citations.

¹⁹ *Moran v. Johnson* (1875), 26 Gratt. (Va.) 108; *Adkins v. Edwards* (1887), 83 Va. 316, 2 S. E. 439.

²⁰ *Brinkman v. Retzinger* (1882), 82 Ind. 364.

carries up the receivership and the receiver ipso facto becomes an officer of the supreme court and subject to its control and direction.²¹

§ 190. Receiver Appointed by Upper Court. Few cases are found wherein a receiver is appointed by the supreme court of a state in a case being reviewed in that court, yet that may be done. Such a receiver is not necessarily removed by a reversal and remand of the case to a lower court. The remand shows that something is yet to be done and it may be in relation to the property itself thus held.²²

²¹ Jones v. Stewart (1900), 61 S. W. 105, Tenn. Ch. App. Court.

²² Brien & Thaxton v. Paul (1887), 2 Tenn. Ch. 357.

CHAPTER XII

RECEIVER AFTER JUDGMENT TO CARRY JUDGMENT INTO EFFECT, ETC.

ANALYSIS

- § 191. Receiver after Judgment or Decree Generally.
- § 192. Receiver after Judgment or Decree by Statute.
- § 193. Receiver after Judgment to Enforce Payment under Judgment.
- § 194. Receiver after Judgment to Enforce the Judgment Itself.
- § 195. Receiver to Carry into Effect the Judgment or Decree.
- § 196. Receiver after Judgment to Make a Conveyance.

§ 191. Receiver after Judgment or Decree Generally.

Where a court of chancery obtains jurisdiction of the subject-matter of a suit it will retain jurisdiction until complete justice has been done between the parties¹ and such jurisdiction is frequently exercised after final decree by the appointment of a receiver.

It is perhaps of rare occurrence that courts are called upon to appoint a receiver after final decree in a cause but that such appointments may be made is well settled,² and this may be done notwithstanding the original bill did not pray a receiver, since the appointment in such a case is made because of occurrences subsequent to the decree.³

In a case where a decree of foreclosure had been had it was discovered that one not a party to the cause was in possession and had been for more than nineteen years and if allowed

¹ Haas v. Chicago, etc. (1878), 89 Ill. 506.

² Cook v. Gwynn (1748), 3 Atk. 690; Bowman v. Bell (1844), 14 L. J. Ch. 119, 14 Sim. 392.

³ Connolly v. Dickson (1881), 76 Ind. 444; Chicago & S. Ry. v. St. Clair (1895), 144 Ind. 377, 42 N. E. 225; Bidwell v. Paul (1875), 5 Baxt. (Tenn.) 593.

to continue he might become absolutely entitled as against the parties. The court appointed a receiver.*

§ 192. Receiver after Judgment or Decree by Statute. To say that a receiver can be appointed "to carry the judgment into effect or to dispose of the property according to the judgment" is to quote the New York statute,⁵ and the substance of a provision found in most of the civil codes of the United States.⁶ Because we find these provisions in the codes does not mean that courts with general equity jurisdiction have not inherent power to appoint receivers in such cases. These statutes are, generally speaking, codifications of the rules and usages of equity governing the appointment of receivers. The codes do not, as a rule, cut down the right of courts to appoint receivers, they generally enlarge the same. Lest there should be a dispute as to whether the usages and rules of equity are suspended by these codes, the Ohio code and many others add a provision to this effect: Receivers may be appointed "in all cases in which receivers heretofore have been appointed by the usages of equity."⁷

§ 193. Receiver after Judgment to Enforce Payment under Judgment. The most frequent cases wherein a court of equity is called upon to enforce the payment under judgment is in creditors' suits with a receiver, as known in the United States, and a receiver by way of equitable execution as known in England. These cases and the principles therein are of so much importance that we have placed them in a separate chapter XIII.

We must, at least for the purposes of classification, distinguish between cases of receivers after judgment to enforce

* *Thomas v. Davies* (1847), 11 Beav. 29; see *Wright v. Alkys*, 1 V. & B. 313; *Goodman v. Kine*, 8 Beav. 379.

⁵ Civil Code of New York, sec. 713; see *King v. Barnes*, 4 N. Y. Supp. 247.

⁶ See Ohio General Code (1910), sec. 11894; California Code of Civil Procedure, sec. 564; see *Kreling v. Kreling* (1897), 118 Cal. 421, at 423, 50 Pac. 549.

⁷ Ohio General Code of 1910, sec. 11894, subsec. 6.

the payment of money under the judgment by creditors' bills and such methods, and receivers to enforce the judgment itself. In these latter cases the defendant has already been by a court ordered to pay some particular money out of some particular fund or property. In the case of creditors' bills, etc., a simple money judgment exists and a court having equity powers lends its aid to collect that judgment.

§ 194. Receiver after Judgment to Enforce the Judgment Itself. Order XLII, sec. 4,^{7a} framed under authority of the English Judicature Act of 1873 provides, "a judgment for the payment of money into court may be enforced by writ of sequestration or in cases in which attachment is authorized by law, by attachment." The English Judicature Act of 1873 provides that a receiver may be appointed by an interlocutory order by the court in all cases in which it shall be just and convenient that such order shall be made. In many cases the process by sequestration would meet with difficulties which a receiver could overcome. And a receiver will secure to the judgment creditor whatever interest the defendant has in the property.⁸ Under the general power to appoint a receiver given by the Judicature Act of 1873, sec. 25, subsec. 8, and having regard to the rules of the Supreme Court of England, 1883, Order XLII, 24 and 28, the chancery division of the supreme court of judicature has jurisdiction to enforce a judgment for payment of money into court by a defaulting trustee, by the appointment of a receiver of his equitable interest in property in the country and order accordingly where from the debtor being out of jurisdiction service of a writ of attachment could not be effected.⁹

A judgment for alimony against the husband when he is a nonresident may be charged against his property. In a case when the husband has ceased to reside in the state, has

^{7a} See ch. XXXII.

⁹ *Coney v. Bennett* (1885), 29 Ch.

⁸ *In re Whiteley* (1887), 56 L. T. D. 993.
R. 846.

not only left the interest on the encumbrances on the property unpaid but also the taxes, the court will appoint a receiver unless satisfactory security is given.¹⁰

A permanent receiver is frequently appointed by the final judgment in order to enforce it.¹¹ Some of the most common modes of enforcing a judgment are by execution, by process, as for contempt, by writ of assistance, writ of possession, injunction, sequestration and by the appointment of a referee, or commissioner to carry the provisions of a judgment into effect.

Cases sometimes arise, however, in which all the foregoing modes of enforcing a judgment or decree requiring some specific act to be done are ineffectual, as for example, where a conveyance is directed to be made, or satisfaction of an instrument acknowledged, and the party is absent, so as not to be amenable to process of contempt, and has no property to be sequestrated according to the ancient practice. In such cases the court may appoint a referee or receiver and authorize him to make the conveyance acknowledgment, etc.

§ 195. Receiver to Carry into Effect the Judgment or Decree.

A court with the equity powers of the old court of chancery is able to carry into execution its own judgment even without the provision of the New York code, sec. 713.¹²

In a case where the judgment can not be carried into effect and a disposition made of the property according to its direction, without arresting such property from the fraudulent possession of the defendant and placing it in the custody of an officer of the court, a receiver may be appointed.¹³

If a receiver is not appointed until after judgment has been rendered, his functions either for the purpose of carrying

¹⁰ Holmes v. Holmes (1878), 29 N. J. Eq. 9.

¹¹ Mabon v. New York, etc. (1898), 156 N. Y. 196, 50 N. E. 805, ancillary receiver case.

¹² New York Civil Code, as amended 1895.

¹³ King v. Barnes (1889), 4 N. Y. Supp. 247, affirmed 113 N. Y. 655, 21 N. E. 184; New York Civil Code, sec. 713, as amended 1895.

the judgment into effect, or for the preservation of the property until the judgment shall be executed are limited to the property described in the judgment.¹⁴

If after a decree is entered the defendant refuses or neglects to perform the acts found to be reasonably necessary to be done by him, it may be necessary that they be done by a receiver or other officer of the court. It can not, however, be assumed in advance that he will so refuse to do his duty and until he does, a receiver ought not generally be appointed.¹⁵

When legatees bring a suit in an equity court to construe a will, they have a right to the intervention of the same court in enforcing the collection of the debt and protecting their interests. If there then be jurisdiction in equity it would seem that the same equity court could appoint a receiver to receive and collect the sum ascertained and ordered paid.¹⁶

§ 196. Receiver after Judgment to Make a Conveyance.

“A person to execute conveyance ordered by a court of equity is frequently appointed and is usually designated a commissioner, but we think it immaterial whether he be called a commissioner or a receiver, since his powers and duties are fixed by the decree and need not be impaired from the name or title of the officer.”¹⁷

California Code, sec. 564 provides for a receiver, “After judgment to carry the judgment into effect.”

¹⁴ Kreling v. Kreling (1897), 118 Cal. 421, at 423, 50 Pac. 549.

¹⁵ Pierce v. Finerty (1911), 76 N. H. 38, at 48, 76 Atl. 194.

¹⁶ Bennet v. Rhodes (1881), 58 Md. 28, at 84.

¹⁷ Scadden Flat, etc., v. Scadden (1898), 121 Cal. 41, 53 Pac. 440.

CHAPTER XIII

RECEIVER AFTER JUDGMENT UNDER CREDITORS' BILLS AND BY WAY OF EQUITABLE EXECUTION

ANALYSIS

- § 197. Equitable Relief for Holder of Judgment at Law or Decree in Equity.
- § 198. 'Creditors' Bills.
- § 199. Distinction between Creditors' Bills and Bills to Set Aside a Deed.
- § 200. Creditors' Bills Are a Continuation of Former Controversy.
- § 201. Creditors' Bills as Used in Federal Courts.
- § 202. Creditors' Bills against Executors and Administrators in England.
- § 203. No Creditors' Bills against Living Debtors in England.
- § 204. Creditors' Bills against Executors and Administrators in United States.
- § 205. Creditors' Bills against Living Judgment Debtors in United States.
- § 206. Creditors' Bills for Discovery of Assets.
- § 207. Creditors' Bills to Set Aside Fraudulent Conveyances.
- § 208. Receivers by Way of Equitable Execution.
- § 209. Receivers by Way of Equitable Execution—English Term.
- § 210. Receiver under Judgment Creditors' Bills.
- § 211. Receiver under Non-Judgment Creditors' Bills—Waiver.
- § 212. Receiver in Supplementary Proceedings.
- § 213. Receiver in Proceedings in Aid of Execution.

§ 197. Equitable Relief for Holder of Judgment at Law or Decree in Equity. There are two classes of cases where a plaintiff is permitted to come into a court of equity for relief after he has proceeded to judgment and execution at law without obtaining satisfaction of his debt.

In the one case the issuing of execution at law gives to the plaintiff a lien upon the property, but he is compelled to come into a court of equity for the purpose of removing some

obstructions fraudulently or inequitably interposed to prevent a sale on execution.¹

In the other case the plaintiff comes into a court of equity to obtain satisfaction of his debt out of the property of the defendant which can not be reached by execution at law. In the latter case his right to relief in the court of equity depends upon the fact of his having exhausted his legal remedies without being able to obtain satisfaction of his judgment.²

In the first case, the plaintiff may come into the court of equity for relief immediately after he has obtained a lien upon the property by the issuing of an execution to the sheriff of the county where the same is situated and the obstruction being removed, he may proceed to enforce the execution by a sale of the property although an actual levy is probably necessary to enable him to hold the property against other execution creditors or bona fide purchasers.³

In the other case when the defendant has no interest in property which interest is a proper subject of seizure by levy and execution,⁴ the issuing of an execution, or even a formal levy, can create no lien upon a chose in action, or a mere equitable interest in personal property which is not liable to be sold on execution (unless the statute especially provides for such a case). In such cases the actual return of the execution unsatisfied is necessary to give the court of equity jurisdiction to decree satisfaction out of the equitable property of the defendant.⁵

A creditor by decree in chancery upon the return of his execution unsatisfied is entitled to the same relief as against the equitable interests and property of his debtor as a creditor by a judgment at law.⁶

¹ *Freedman's S. & T. Co. v. Earle* (1883), 110 U. S. 715, 28 L. ed. 301, 4 S. C. Rep. 226; *Rice v. McJohn* (1910), 244 Ill. 264, at 270, 91 N. E. 448.

² *Freedman's S. & T. Co. v. Earle* (1883), 110 U. S. 715, 28 L. ed. 301, 4 S. C. Rep. 226; *Rice v. McJohn* (1910), 244 Ill. 264, at 270, 91 N. E. 448.

³ *Beck v. Burdett* (1829), 1 Paige 305; see further examples, *Angel v. Draper* (1686), 1 Vern. 399; *Shutey v. Watts* (1744), 3 Atk. 200.

⁴ *McDermott v. Strong* (1820), 4 Johns. Ch. 687.

⁵ *Beck v. Burdett* (1829), 1 Paige 305.

⁶ *Clarkson v. De Peyster* (1832), 3 Paige 318.

The court of equity in giving relief to a holder of a judgment or decree and enabling the complainant to come at the property of the defendant does not do it on the ground that the complainant has any specific lien on the property, but after the complainant brings his bill there is a *lis pendens* created as to the res, therefore, an assignment of the res after such a bill brought could not prevail although if after judgment the debtor had assigned a legacy or other chose in action or other property not covered by a judgment lien and such assignment had been made for a valuable consideration and without notice it would be good and prevail against the judgment creditor.⁷

Mr. Justice Field, of the United States Supreme Court, said: "In all cases where a court of equity interferes to aid the enforcement of a remedy at law, there must be an acknowledged debt, or one established by a judgment rendered accompanied by a right to the appropriation of the property of the debtor for its payment; or to speak with greater accuracy, there must be, in addition to such acknowledgment or established debt, an interest in the property, or a lien thereon, created by contract, or by some distinct legal proceeding."⁸

§ 198. Creditors' Bills. Creditors' bills are bills in equity filed by judgment creditors for the purpose of obtaining relief after he has proceeded to judgment and execution at law without obtaining satisfaction of his debt.⁹ To file such a bill in the case of a living debtor, the creditor must have a judgment at law or a decree in equity.¹⁰ To file such a bill when the debtor is deceased, the creditor does not have to have a judgment.¹¹ The jurisdiction of a court of equity to sustain a

⁷ Lord Hardwick in *Edgell v. Haywood* (1746), 3 Atk. 356.

⁸ *Scott v. Neely* (1890), 140 U. S. 106, at 113, 35 L. Ed. 358, 11 S. C. Rep. 712; approved, *D. A. Tompkins* (1897), 82 Fed. 780, at 783; see also *Talley v. Curtain*, 8 U. S. App. 347, 54 Fed. 43. See *Davis v.*

Hayden (1916), 238 Fed. 734, at 738, and cases cited.

⁹ *Freedman's S. & T. Co. v. Earle* (1883), 110 U. S. 715, 28 L. ed. 301, 4 S. C. Rep. 226.

¹⁰ *Clarkson v. De Peyster* (1832), 3 Paige 318.

¹¹ *Harmon v. Wagener* (1890), 33 S. C. 487, 12 S. E. 98.

creditor's bill in the case of a living debtor is auxiliary or ancillary to aid legal process. The jurisdiction of a court of equity to entertain a creditor's bill against the administrator or executor of a deceased person comes under a head of original jurisdiction in equity.¹²

Ordinarily a creditor's bill can only be filed by a judgment creditor, yet the objection that the creditor has not reduced his claim to judgment is waived and stands as though it had never existed, when the defendant voluntarily appears, confesses the debt, admits its insolvency and joins in the prayer for a receivership. Furthermore objections that the creditor bringing the bill and asking for a receiver can not be raised by other creditors who were not parties to the suit as brought and the case will not be regarded as collusive merely because the parties to the suit acted in accord and arranged together that the suit should be brought in a given court and that the averments of the bill should be admitted by the answer.¹³

§ 199. Distinction between Creditors' Bills and Bills to Set Aside a Deed. A distinction is to be made between a creditor's bill seeking to satisfy the complainant's debt out of some equitable estate of the defendant not liable to levy and sale under an execution at law and a bill by a creditor seeking to remove a fraudulent conveyance out of the way of an execution.¹⁴

Under the first-mentioned bill the complainant must show he has exhausted his remedy at law by obtaining a judgment, execution thereon and the return of execution "in property found."

¹² Hagan v. Walker (1852), 14 How. 28, at 33, 14 L. ed. 312.

¹³ American Brake S. & F. Co. v. Pere Marquette R. Co. (1913), 205 Fed. 14; see *In re Metropolitan Ry.* Rec. (1907), 208 U. S. 90, at 110,

52 L. ed. 403, 28 S. C. Rep. 219; *Howe v. Pere Marquette R. R. Co.*, 151 Fed. 633, at 636.

¹⁴ Miller v. Davidson (1846), 3 Gilm. 518; *Rice v. McJohn* (1910), 244 Ill. 271, 91 N. E. 448.

Under the last-mentioned bill, a bill in aid of execution, the creditor may proceed as soon as he obtains judgment and without and before issuing an execution thereon.¹⁵

"If a claim is to be satisfied out of a fund, which is assessable only by the aid of a court of chancery, application may be made in the first instance to that court, which will not require that the claim should be first established in a court of law."¹⁶

The only relief granted under a bill filed in aid of an execution is to set aside the encumbrances or conveyances alleged to be fraudulent. Under a creditor's bill pure and simple any equitable estate of the defendant may be reached.¹⁷

Circumstances might arise where it would become proper and necessary for the chancellor to appoint a receiver under creditors' bills in aid of execution to preserve the property and prevent waste.¹⁸

§ 200. Creditors' Bills are a Continuation of Former Controversy. Bills not original are those which relate to some matter already litigated in the court by the same person and which are additions to or continuances of original bills or both. A creditor's bill is a continuation of the former controversy, so far as the fruits of the judgment are concerned. The complainant asks the aid of the court to reach the assets of the defendant so as they may be subjected to his judgment.¹⁹

However a judgment obtained in one state can not be the foundation for a creditor's bill in another state. It must be sued over before it becomes a judgment for the purpose of

¹⁵ Dawson v. First Nat. Bk. (1907), 228 Ill. 575, at 579, 81 N. E. 1128; Rice v. McJohn (1910), 244 Ill. 271, 91 N. E. 448; Dillman v. Nadelhoffer, 162 Ill. 625, 45 N. E. 680; Weightman v. Hatch, 17 Ill. 281; French v. Commercial Bank, 199 Ill. 213, 65 N. E. 252; Andrews v. Donnerstag, 171 Ill. 329, 49 N. E. 558; Hughes v. Noyes, 171 Ill. 575, 49 N. E. 703; Wisconsin Gran-

ite v. Gerrity, 144 Ill. 77, 33 N. E. 31; Newman v. Willetts, 52 Ill. 98.

¹⁶ Russell v. Clark's Exrs., 7 Cranch 87, 3 L. ed. 271.

¹⁷ Rice v. McJohn (1910), 244 Ill. 271, 91 N. E. 448.

¹⁸ Rice v. McJohn (1910), 244 Ill. 264, 91 N. E. 448.

¹⁹ Hatch v. Dorr (1846), (Mich.), 4 McLean 112; Hobbs Mfg. Co. v. Gooding (1908), 164 Fed. 91.

any remedy in the second state, at law or in equity. The judgment rendered in one of our sister states has no operation in another state upon the rights or the remedies of the parties to it.

Actions in aid of execution at law are ancillary to the original suit and are in effect a continuance of the suit at law to obtain the fruit of the judgment, or to remove obstacles to its enforcement.²⁰

§ 201. Creditors' Bills as Used in Federal Courts. Revised Statutes, sec. 916 (United States Comp. St., 1901, p. 684) which provides that a party recovering a judgment in any common-law cause in a federal court "shall be entitled to similar remedies on the same by execution or otherwise to reach the property of the judgment debtor as are now provided in like causes by the laws of the state," etc., does not embrace remedies in equity by independent suit which may have been given by the statutes of a state²¹ but is limited by the phrase "in like causes" to remedies provided in actions at law wherein judgments were recovered.

It has long been the practice for a creditor who has exhausted his remedies at law by procuring a personal judgment and an unavailing execution, to file what has always been called a "creditor's bill" to obtain from his debtor a discovery of his assets and for the subjection thereof to the payment of the judgment. The relief thus sought can be obtained by compelling the debtor to surrender to the court such of his property as he has in his possession or under his control and if necessary by the appointment of a receiver with authority to sue for and collect any demands or choses in action that may be due to the judgment debtor.

§ 202. Creditors' Bills against Executors and Administrators in England. Creditors' bills filed against administrators or

²⁰ *Claffin v. McDermott* (1882), 12 Fed. 375.

²¹ *Hudson v. Wood* (1903), 119 Fed. 764, at 776.

executors of estates of deceased persons are very common in England.²²

A creditor's bill is not a proceeding in rem, therefore it can not be brought against the estate of a deceased person, but must be brought against a person, the administrator or executor or heir or legatee or someone having the property in hand.

§ 203. No Creditors' Bills against Living Debtors in England.

Creditors' bills against a living judgment debtor or against persons having in their hands property of a living judgment debtor are very common in America. In England the practice of filing a bill by the name of "creditor's bill" to get possession of property of a living judgment debtor and having it applied to the payment of the judgment is almost unknown. However, proceedings which accomplish the same ends and which are substantially the same proceedings with a different name are proceedings by way of equitable execution. Such proceedings are very common in England and the rules and usages of equity governing them now are generally the same as the rules and usages of equity governing the use of creditors' bills in the United States.

§ 204. Creditors' Bills against Executors and Administrators in United States. A creditor of a deceased debtor may bring his bill against the administrator or executor for a discovery of assets and the payment of his debt is well settled.²³ In some cases he may join with the administrator a third person, who is in possession of property which is amenable to the payment of the debt. The instances in which it has been actually held that such third person might be joined, are chiefly cases of collusion between the administrator and the third person

²² Daniel, Chancery, sec. 1720; Utterson v. Mair (1793), 2 Ves. 95; Alsagar v. Rowley (1802), 6 Ves. 748; Burroughs v. Elton (1805), 11 Ves. 29; Gedge v. Traill (1823), 1

Rus. & M. 281; Tunison v. Vaughn (1739), 3 Atk. 33; Cooper v. Cresswell (1866), 7 Ch. App. Cas. 112.

²³ Hagan v. Walker (1852), 14 How. 28, at 34, 14 L. ed. 312.

possessed of the assets, insolvency of the administrator, and where the third person was the surviving partner of the deceased.²⁴ It would be of dangerous consequences to make any person a defendant who has assets unless you can show the court he denies that he has assets or applies them improperly.²⁵ Some special and sufficient reasons must be shown for proceeding against a third person jointly with the administrator.²⁶

When a creditor of a deceased debtor brings his creditor's bill for discovery of assets or for the setting aside of a fraudulent conveyance, he does not have to have a judgment before bringing his bill and the court in entertaining the bill does not exercise an ancillary jurisdiction to aid legal process, and consequently it is not necessary that the creditor should be in a condition to levy an execution. This jurisdiction of the court to entertain a creditor's bill against the administrator or executor of a deceased person comes under a head of original jurisdiction in equity.²⁷

When a person goes into a court of equity and asks for a discovery of assets and the payment of his debt, he will not be turned back to a court of law to establish the validity of his claim.²⁸

§ 205. Creditors' Bills against Living Judgment Debtors in United States. The court of chancery has power to assist a judgment creditor to discover and reach the property of a debtor which is beyond the reach of an execution at law. To get possession of the equitable interest of the debtor as a re-

²⁴ *Utterson v. Mair* (1793), 2 Ves. 95; *Alsagar v. Rowley* (1802), 6 Ves. 748; *Burroughs v. Elton* (1805), 11 Ves. 29; *Gedge v. Traill* (1823), 1 Rus. & M. 281; *Long v. Majestic* (1814), 1 Johns. Ch. 306.

²⁵ *Simpson v. Vaughan* (1739), 2 Atk. 339.

²⁶ *Hagan v. Walker* (1852), 14 How. 28, at 34, 14 L. ed. 312.

²⁷ *Hagan v. Walker* (1852), 14 How. 28, at 33, 14 L. ed. 312.

²⁸ *Kennedy v. Creswell* (1879), 101 U. S. 641, at 646, 25 L. ed. 1075; *Johnson v. Powers* (1882), 13 Fed. 15, at 316; *Thompson v. Brown* (1820), 4 Johns. Ch. 619.

sulting trust in goods and chattels the judgment creditor must come into a court of equity.²⁹

The debts, choses in action and other equitable rights of the defendant may be assigned or sold under a decree of a court of equity so as to vest an equitable interest in the purchaser which will be protected both in equity and at law. The principle being established that every species of property belonging to a debtor may be reached and applied to the satisfaction of his debts, the powers of a court of equity are perfectly adequate to carry that principle into effect.³⁰

§ 206. Creditors' Bills for Discovery of Assets. That a creditor has a right to come into a court of chancery and ask for a discovery of the assets of a decedent's estate, was well settled as early as 1747 by Lord Hardwick³¹ and also later by the chancery court of New York State.³² In the matter of a living debtor the same necessity arises. The same necessity exists to have a disclosure of assets from a living judgment debtor.³³ When a creditor has through the instrumentality of a court of equity sought out and discovered the property of his debtor which he had before been unable to discover and seize upon execution at law, he becomes entitled to a preference over other creditors to have his judgment satisfied.³⁴ It is not in the power of the debtor to withdraw what the judgment acquires by reason of bringing the creditors' bills, nor by making an assignment for the benefit of creditors under an insolvency act.³⁵ Though it is a favorite policy of the chancery court to distribute assets equally among creditors *pari passu*,

²⁹ *McDermott v. Strong* (1820), 4 Johns. Ch. 687.

³⁰ *Eameston v. Lyde* (1829), 1 Paige 641.

³¹ *Anonymous* (1747), 3 Atk. 571; *McKay v. Green* (1817), 3 Johns. Ch. 58, at 59.

³² *Thompson v. Brown* (1820), 4 Johns. Ch. 631; *Miers v. Zanesville*, etc. (1842), 11 O. 273.

³³ *Miers v. Zanesville*, etc. (1842), 11 O. 273; *Hadden v. Spader* (1822), 4 Johns. Ch. 554; *Gordon v. Lowell* (1842), 21 Me. 257.

³⁴ *Gordon v. Lowell* (1842), 21 Me. 257.

³⁵ *McDermott v. Strong* (1820), 4 Johns. Ch. 687.

yet whenever a judicial preference has been established by the superior legal diligence of any creditor, that preference is always preserved in the distribution of assets by the chancery court.³⁶

A judgment creditor in asking for a discovery of the assets of the judgment debtor may have not only a disclosure of his assets, but the names of his debtors.³⁷

A complainant is entitled to a discovery of all the estate or property which the defendant has, either in the jurisdiction of the court or elsewhere. If it is within the state it may be reached by execution out of the court (in the state of New York and in most states either by constitution or statute) and if out of the state, the defendant being in the appointing court's jurisdiction may be compelled to transfer it by a proper conveyance, to a receiver, to be sold and applied to the payment of the complainant's debt.³⁸

§ 207. Creditors' Bills to Set Aside Fraudulent Conveyances.

A court of chancery lends its aid to a judgment creditor by compelling a discovery and account against a debtor or third person who has possession of the debtor's property, which is placed beyond the reach of legal process by the complainant. Such a court can declare conveyances fraudulent and set them aside.³⁹ The complainant may also compel the application to the payment of his claims of the choses in action of the debtor fraudulently assigned.⁴⁰

To obtain an equitable lien upon property not subject to a levy and sale under an execution, the creditor must have exhausted his remedy under his judgment or decree by the return of an execution unsatisfied.⁴¹

³⁶ *McDermott v. Strong* (1820), 4 Johns. Ch. 691; *Thompson v. Brown* (1820), 4 Johns. Ch. 619.

³⁷ *Cadwallader v. Granville*, etc. (1842), 11 O. 292.

³⁸ *LeRoy v. Rogers* (1832), 3 Paige 231.

³⁹ *Hendricks v. Robinson* (1817), 2 Johns. 283.

⁴⁰ *Bayard v. Hoffman* (1820), 4 Johns. Ch. 450; *Tantum v. Green* (1869), 21 N. J. Eq. 365; see *Beck v. Burdett* (1829), 1 Paige 305.

⁴¹ *Beck v. Burdett* (1829), 1 Paige 305; *A. Brinkerhoff v. Brown* (1820), 4 Johns. Ch. 677; *Clarkson v. DePeyster* (1832), 3 Paige 320.

But to obtain relief against an incumbrance upon the real estate of the debtor, improperly or fraudulently created, it is not necessary for the judgment creditor even to sue out an execution, but he might have filed his bill in respect to his lien, and clear the estate at any time after the docketing of his judgment.

Where a deed is set aside as interfering with the rights of creditors, it is as to those creditors as if it had never existed. The effect of setting aside the deed is to leave the creditors to enforce their claims and obtain satisfaction according to their legal priority, or if the court later have charge of the fund, to direct them to be paid according to their legal rank. The principle is that this court will not disturb legal liens. The voluntary deed by a debtor in such a case may be regarded as a nullity.⁴²

§ 208. Receivers by Way of Equitable Execution. In an ordinary action for money only, the plaintiff asks the court to compel the defendant by means of legal process to pay what is due to him. The question in dispute in such an action may sometimes be the amount due, but it more often is the mode of obtaining payment. That being so the court gives judgment against the defendant by which it declares and ascertains the amount due and orders the defendant to pay it. If the defendant disobeys the order of the court, the only mode which as a general rule the law recognizes of compelling him to pay, is by taking away his property, realizing on it, and applying the proceeds in payment of the plaintiff's demand. Excluding the exceptional cases in which attachment is allowable or available by statute, the mode of compelling payment is by execution, that is, obtaining in some shape or other by legal

⁴² Gracey v. Davis (1849), 3 Strob. (S. C.) 55. Cases cited, Austin v. Bell, 20 L. J. 442; Codwise v. Golston, 10 L. J. 588; McDermott v.

Strong, 4 J. C. R. 687; McMeekin v. Edmonds, 1 Hill C. R. 293; Fuller v. Anderson, 1 McMul. E. R. 34.

process possession of the defendant's lands and goods, selling them, paying the contingent expenses and out of the proceeds paying the demand.⁴³

"What gives a judgment creditor a right against the estate of the defendant, is only the act of parliament,⁴⁴ for independently of that he has none. * * * The effect of proceeding under the writ, that is under ordinary execution, is to give to the creditor a legal title, which if no impediment prevents him, he may enforce at law by ejectment." ⁴⁵

If the property remains in the hands of the debtor, it may by means of a sale or other disposition be rendered unavailable for the purposes of the execution.⁴⁶

Now it often happens that the defendant may be in possession of land and the legal estate is in some one else. In such a case the plaintiff can not have ordinary execution issued against the land.⁴⁷ In England and in some of the states in mortgage cases, the outstanding legal title is in the mortgagee ⁴⁸ instead of the mortgagor, in which event legal execution will not issue against the mortgagor's interest. Also when defendant's property is covered by bill of sale, no legal execution will lie.⁴⁹ Also in a case wherein the plaintiff had a judgment against a married woman entitled for life to her separate use to the dividends of a sum of stock standing in the names of trustees who were not parties to the action,⁵⁰ legal execution will not lie.

In all these cases by ordinary execution process the plaintiff could not get satisfaction of his judgment, could not get possession of the property because it did not legally belong to the defendant, or was not in his possession. In other words

⁴³ *Salt v. Cooper* (1880), 16 Ch. D. 544.

⁴⁴ 13 Ed. 1, cap. 18.

⁴⁵ *Neate v. Duke of Marlborough* (1838), My. & A. 407.

⁴⁶ *Anglo-Italian Bank v. Davies* (1878), 9 Ch. D. 275.

⁴⁷ See *Levasseur v. Mason* (1891), 2 Q. B. D. 73.

⁴⁸ *Anglo-Italian Bank v. Davies* (1878), 9 Ch. D., 275 C. A.; *Salt v. Cooper* (1880), 16 Ch. D. 544.

⁴⁹ *Westhead v. Riley* (1883), 25 Ch. D. 413.

⁵⁰ *Brill v. Bryant* (1878), 10 Ch. D. 153.

there were legal impediments. Therefore plaintiff comes into a chancery court or a court having chancery jurisdiction not to obtain a greater benefit than the law has given him, but to have the same benefit by the process of the court of chancery which he would have at law if no legal impediment had intervened.⁵¹

Equitable execution is a process which the court allows for the purpose of enabling a judgment creditor to obtain payment of his debt, when the position of the real estate is such that ordinary execution will not reach it. The process, which was formerly the process of the court of chancery by appointment of a receiver, is one that will reach many things which can not be taken in execution and the appointment of a receiver therefore is a form of equitable execution. But receiver of what? Not receiver of the subject-matter of the action, but receiver of some portion of the defendant's property which is charged already with payment of the judgment debt, but which there is difficulty in reaching. He is receiver, not of lands or of rents, but of the defendant's interest, and nothing else, and is confined to that. That is the simple mode of equitable execution.⁵²

Equitable execution is a mode of obtaining payment of a judgment debt by the appointment of a receiver of property of a defendant, which the sheriff is by reason of the imperfection of the statutes respecting executions unable to reach or deal with.⁵³

A charging order is the method by which stocks or shares or a fund in court are made available to satisfy a judgment or order.

The appointment of a receiver is not the only method of equitable execution, a charging order over a fund in court or

⁵¹ *Neate v. Duke of Marlborough* (1838), 3 My. & Cr. 417; *Anglo-Italian Bank v. Davies* (1878), 9 Ch. D. 275, at 291; *Levasseur v. Mason & Berry* (1891), 2 Q. B. D.

73; *Walmsley v. Mundy* (1884), 13 Q. B. D. 811.

⁵² *Wills v. Luff* (1888), 38 Ch. D. 197, at 200.

⁵³ *Kirk v. Burgess* (1888), 15 Ont. Rep. 608, at 609.

in the hands of a receiver, to which the debtor is entitled,⁵⁴ and the granting of an injunction against the holder of money from payment of the money,⁵⁵ are other methods by which the court issues what is substantially equitable execution.

§ 209. Receivers by Way of Equitable Execution—English Term. The term receiver by way of equitable execution is almost purely an English term. In America the courts appoint a receiver by way of equitable execution substantially as they do in England, and in the early history of New York chancery practice the term equitable execution was used. Subsequently, however, the legislature passed statutes providing for supplementary proceedings to be taken by a judgment creditor to realize his judgment when ordinary execution at law was not available. Under these legislative enactments, a receiver in supplementary proceedings was provided for. Other states passed legislation accomplishing the same ends and called it proceedings in aid of execution with receivers. In the federal courts and generally in states where they still preserve in form the distinction between equitable and common-law actions and in those states where they have a separate chancery court, the courts appoint what amounts to a receiver by way of equitable execution under a creditor's bill. A creditor's bill in the United States is filed generally by a judgment creditor who can not make his judgment by the ordinary legal execution. In England creditors' bills are usually and almost exclusively brought against estate of the deceased.

§ 210. Receiver under Judgment Creditor's Bill. A creditor's bill, as usually used in America, asking for a receiver, is generally equivalent to a receiver after judgment to reach equitable assets, called equitable execution in the English practice.

⁵⁴ *Brereton v. Edwards* (1888), 21 Q. B. D. 488 C. A.; *In re Carder Armstrong v. Paris* (1888), W. N. 17.

⁵⁵ *Thornton v. Finch* (1864), 49 Giff. 515; *Bullus v. Bullus* (1910), 102 L. T. 399.

In the code states of America, we have statutory proceedings generally called "proceedings in aid of execution" and "supplementary proceedings," which are practically equivalent to the receiver by way of equitable execution as known to the English practice.

The Old and New State Reports are full of cases wherein a creditor's bill was brought and a receiver appointed to receive the property of the judgment debtor and apply it to the plaintiff's claim,⁵⁶ or in case the defendant in the creditor's suit denied owing the judgment debtor any property or money, then it can only be recovered in an action by the receiver.⁵⁷

Such bills are now frequently found in the non-code states⁵⁸ and in the federal courts.⁵⁹ In the code states the matter of getting at equitable assets has generally been fully covered by statutes called "proceedings in aid of execution" or "supplementary proceedings," and receivers are appointed under such statutes.

§ 211. Receiver under Non-judgment Creditor's Bill—Waiver. The ordinary rule is that simple contract creditors whose claims have not been reduced to judgment and who have no express lien on the property of the defendant have no standing in a court of equity to obtain the seizure of their debtor's property and its application to the payment of their debts.⁶⁰ However, defenses existing in equity suits may be waived just as they may in law actions and when waived the cases stand as

⁵⁶ *Eameston v. Riddle* (1829), 1 Paige, 637; *Osborne v. Heyer* (1831), 2 Paige, 342; *Browning v. Bettis* (1841), 8 Paige, 568; *Filzburge v. Everingham* (1836), 6 Paige, 29; *Bloodgood v. Clark* (1834), 4 Paige, 574; *Bank v. Schermerhorn* (1840), Clark Ch. 214; *Fuller v. Taylor* (1847), 2 Halst. Ch. (N. J.) 301; *Nartzik v. Ehman* (1914), 191 Ill. App. 71.

⁵⁷ *Durand v. Hankerson* (1868), 39 N. Y. 287, at 294.

⁵⁸ *Thomas v. Van Mater* (1896), 164 Ill. 304, 45 N. E. 405; *Campau v. Detroit Driving Club* (1906), 144 Mich. 99, 107 N. W. 1063; *Turnbull v. Lumber Co.* (1884), 55 Mich. 387.

⁵⁹ *American Brake, etc., v. Pere Marquette* (1913), 205 Fed. 14; *In re Metropolitan Ry. Rec.* (1907), 208 U. S. 90, 52 L. ed. 403, 28 S. C. Rep. 219; *Howe v. Pere Marquette Ry.* (1907), 151 Fed. 626.

⁶⁰ *Hollins v. Brierfield, etc.* (1893), 150 U. S. 371, 37 L. ed. 1113 14 S. C. Rep. 197

though the objection never existed.⁶¹ The defense that the complainants were not judgment creditors who had issued execution which was returned unsatisfied may be waived by consent of the defendant to appointment of receiver.⁶²

§ 212. Receivers in Supplementary Proceedings. The early New York chancery reports are full of cases in which creditors' bills were filed and receivers were appointed to get in the property of the judgment debtor when ordinary execution at law was not available. In 1848 when the New York code was passed provision was made therein for a judgment creditor to bring supplementary proceedings⁶³ to get in the estate of the judgment debtor when ordinary execution at law was not available. A receiver was authorized under general receiver statute New York Code of 1848, sec. 244, sec. 3, "After judgment to dispose of the property according to the judgment or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply the property in satisfaction of the judgment."

However, later this sentence "or when an execution has been," etc., was cut out of statute 244 and the substance incorporated under receivers in supplementary proceedings New York Civil Code, secs. 2464-2471. It must be noted that the New York Supreme Court with the equity powers of chancery, has the power to carry into execution a judgment or to apply the property of the judgment debtor to the satisfaction of the judgment even without the provision of New York Civil Code, sec. 713, or New York Civil Code, secs. 2464-2471. In other words these statutes generally, as far as the receivers are concerned, are little more than a codification of the ordinary chancery powers of the courts.

⁶¹ *Hollins v. Brierfield, etc.* (1893), 150 U. S. 380, 37 L. ed. 1113, 14 S. C. Rep. 127; *Union Trust Co. v. Southern Sawmills & Lumber Co.* (1908), 166 Fed. 193, at 195.

⁶² *In re Metropolitan Ry. Rec.* (1907), 208 U. S. 110, 52 L. ed.

U. S. 530, 33 L. ed. 1021, 10 S. C. Rep. 604; *Howe v. Pere Marquette Co.* (1907), 151 Fed. 626, at 633; *Union Trust Co. v. Southern Sawmills & Lumber Co.* (1908), 166 Fed. 193, at 195.

⁶³ New York Civil Code, 2 R. S. 173, secs. 38, 39. *Catlin v. Doughty*

§ 213. **Receiver in Proceedings in Aid of Execution.** Most of the civil codes enacted by the states contain provisions for receivers in supplementary proceedings⁶⁴ or receivers in proceedings in aid of execution.⁶⁵ Although different in name they are eventually alike in that they aim to enable the judgment creditor to get in the judgment debtor's property and have it applied to the judgment when an ordinary legal execution is not available. They accomplish what is done in the federal courts and noncode states generally under the term "creditors' bills" and what is accomplished in England without special statutes under the head "receivers by way of equitable execution."

⁶⁴ New York Civil Code, sec. 2464-2471.

⁶⁵ Ohio General Code (1910), sec. 11782 et seq.

CHAPTER XIV

RECEIVERS OF CORPORATIONS AND PUBLIC UTILITIES

ANALYSIS

RECEIVERS OF CORPORATIONS—GENERALLY

- § 214. Original Doctrine—Courts of Equity No Inherent Power to Appoint Receiver of Corporation.
 - (a) American Decisions.
 - (b) English Decisions.
- § 215. Modern Doctrine—Courts of Equity Have Inherent Power to Appoint Receiver of Corporation.
- § 216. No Receiver of Corporation in Improper Cases Even with Consent.
- § 217. No Annulling of Charter of Corporation by Court of Equity.
- § 218. No Dissolution of Corporation by Court of Equity, Except by Statute.
- § 219. No Dissolution Except by Creating State.
- § 220. Dissolution of Private Corporation by Vote of Majority of Stockholders.
- § 221. Effect of Dissolution of Corporation on Pending Suits.
- § 222. Receiver of Assets of Corporation after Dissolution.
- § 223. Receiver to Wind Up Affairs of Corporation without Dissolution.
- § 224. Receiver Not Ordinarily Appointed to Carry on Business of Corporation.
- § 225. Receiver May Sometimes be Appointed to Carry on Business of Corporation.
- § 226. Receiver of Public Utility Corporation.
- § 227. Effect of Appointment of Receiver to Carry on Business of Corporation.
- § 228. Powers and Duties of Receiver to Carry on Business of Corporation.
- § 229. Ancillary Receivers of Corporations.
- § 230. Comity in the Matter of Appointment of Receiver of Corporation.
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- § 232. Stockholders Have No Relief at Law against Directors.
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Receiver to Wind Up Affairs of Corporation without Dissolution.

RECEIVER OF CORPORATION AT INSTANCE OF CREDITORS

- § 239. Creditors Generally Seeking Appointment of Receiver of Corporation.
- § 240. Grounds Generally for the Appointment of Receiver of Corporation.
- § 241. Insolvency Ground for Appointment of Receiver of Corporation.
Solvency Not Always Prevents Appointment of Receiver of Corporation.
- § 242. Simple Contract Creditor Generally Can Not Have Receiver of Corporation.
- § 243. Simple Contract Creditor of Dissolved Corporation Having Receiver of Corporation.
- § 244. Judgment Creditor Having Receiver Appointed of Corporation.
- § 245. Secured Creditors Having Receiver Appointed of Corporation.
- § 246. Secured Creditors Bringing Foreclosure Proceedings Having Receiver of Corporation.
- § 247. Simple Contract Creditors of Dissolved Corporation Having Receiver Appointed.

RECEIVERS OF CORPORATIONS—GENERALLY

- § 214. Original Doctrine—Courts of Equity No Inherent Power to Appoint Receiver of Corporation. (a) American

Decisions. In 1817 Chancellor Kent of New York held that the jurisdiction of chancery did not extend to the sequestration of the property of a corporation by means of a receiver or to the winding up of its affairs or to control or restrain the usurpation of franchise by corporate bodies, or by persons claiming without right to exercise corporate powers.¹

The learned chancellor did say in the same case, however, "But at the same time I admit that the persons who from time to time exercise the corporate powers may in their character of trustees be accountable to this court for a fraudulent breach of trust and to this plain and ordinary head of equity the jurisdiction of this court over corporations ought to be confined."

The New York courts have continued to quote, with approval, Chancellor Kent's holding that the jurisdiction of chancery does not extend to the sequestration of the property of the corporation by means of a receiver.²

The term sequesterate as known to the law may mean among other things the seizure of one's property by order of a court of chancery, and also the seizure or confiscation of one's property for the use of the state.³ In recent times the term is used very loosely to mean the taking possession of property.

If Chancellor Kent used the term sequestration as meaning confiscate for the use of the state, then the law as laid down by him holds good today. If he meant that a court of equity can not take possession of the property of a corporation as it can that of an individual for preservation or realization for litigants and claimants, then Chancellor Kent's statement as to sequestration is not the law today.

In 1886, Andrews, Judge, commenting on Chancellor Kent's decision says: "The refusal of the courts of chancery to enter-

¹ Attorney General v. Utica Ins. Co. (1817), 2 Johns. Ch. 371.

² Matter of Coleman (1903), 174 N. Y. 373, at 382, 66 N. E. 983; Matter of Binghamton G. E. Co. (1894), 143 N. Y. 261, at 263, 38 N. E. 297; United States Trust Co.

v. New York, N. S. & B. Ry. Co. (1886), 101 N. Y. 478, at 483, 5 N. E. 316; Attorney General v. Bank of Niagara (1825), Hopk. 354.

³ Century Dictionary, Vol. 5, p. 5504.

tain jurisdiction of corporate bodies at the instance of creditors, or to wind up their affairs, in case of insolvency led to the enactment by the New York legislature in 1825 of an act (chapter 325 of the laws of that year) conferring jurisdiction upon the court of chancery to sequester the property of a corporation upon the application of a judgment creditor, and to appoint a receiver of its property. This system inaugurated by the Act of 1825, and incorporated into the revised statutes has been continued by the codes."⁴ Judge Andrews, in this same case, also admits that courts of chancery possess and exercise in many cases the power to appoint receivers pendente lite of property of a corporation which is the subject-matter of litigation before the court, for the purpose of preserving the property or realizing it for a creditor. Such a power does not depend upon statute and is not affected by the character of the parties before it, whether an individual or a corporation, or by the nature of the property. "While this class of receivers have many duties and powers peculiar to themselves, they are such only that flow from the nature and character of the property committed to their charge."⁵ The federal courts of the United States are continually appointing receivers at the instance of creditors to preserve and realize the property of corporations.⁶

The eminent authority of Chancellor Kent has been quoted and followed in many states;⁷ at the same time most states have passed statutes similar to the New York statute providing

⁴ *United States Trust Co. v. New York, W. S. & B. R. Co.* (1886), 101 N. Y. 484, 5 N. E. 316.

⁵ *United States Trust Co. v. New York, N. T. & B. Ry. Co.* (1886), 101 N. Y. 478, 5 N. E. 316; approved and followed, *Decker v. Gardner* (1891), 124 N. Y. 338, 26 N. E. 814.

⁶ See sec. 215, *Modern Doctrine*—court of equity has inherent power to appoint receiver of corporation.

⁷ *Walker v. The Mad River, etc.*

(1837), 8 Ohio, 38; *Hodges v. New England Screw Co.* (1850), 1 R. I. 312; *Port Huron, etc., v. Judge of Court* (1875), 31 Mich. 456; *Cady v. Centreville, etc.* (1882), 48 Mich. 133, 11 N. E. 839; *Miner v. Ice Co.* (1892), 93 Mich. 97, at 112, 53 N. W. 218; *Coquard v. National Linseed Oil, etc.* (1898), 171 Ill. 480, at 485, 49 N. E. 563; *Murray v. Superior Court* (1900), 129 Cal. 628; *Enstein v. Rosenfeld* (1884), 62 Pac. 191, 38 N. J. Eq. 309.

for the appointment of a receiver and the dissolution of a corporation and winding up of its affairs.

Said Charles M. Curtis, Chancellor of Delaware, 1911: "The appointment of receivers of corporations is a development in rather recent times of the application of general powers of the court of chancery to grant relief to prevent injuries to property rights where no adequate relief is given by the civil courts. Without discussing the historical origin of receivers in general, it may be said that they were appointed as auxiliary to other proceedings. It is doubtful if even under the visitorial powers originally in the sovereign and by him delegated later to his chancellor and so perpetuated in the court of chancery there is authority in that court to administer the affairs of corporations independent of statutes. * * * The federal courts have in some cases held otherwise.⁸ Statutory jurisdiction for the purpose is so generally conferred that it is now generally an academic question."⁹

There has been little or no modification anywhere of Chancellor Kent's holding that a court of equity has no power to wind up the affairs of a corporation. That statement still holds good. A corporation is created by the legislature and a court of equity without direct power by statute from the legislature has no power to wind up or dissolve that which the legislature has created.¹⁰

⁸ See *Carson v. Allegheny Window Glass Co.* (1911), 189 Fed. 791, at 796; *Sellman v. German Union Fire Ins. Co.* (1909), 184 Fed. 977, at 978.

⁹ *Thoroughgood v. Georgetown Water Co.* (1910), 9 Del. Ch. 84, at 89, 77 Atl. 720.

¹⁰ In *Miner v. Ice Co.* (1892), 93 Mich. 97, 53 N. W. 218, the bill filed asked for a receiver and an accounting and to wind up the affairs of the company. The Michigan Supreme Court says: "The general rule undoubtedly is that courts of equity

have no power to wind up a corporation in the absence of statutory authority. The court then says that the rule is subject to the exception that when it turns out that the purpose for which the corporation was formed can not be attained, it is the duty of the company to wind up its affairs, and the court appoints a receiver to wind up the affairs of the corporation." It must be noticed that winding up the business of the company does not necessarily mean forfeiting the charter of the company, which we maintain can only

As to the matter of restraining the usurpation of franchise by a corporation, the remedy for the nonuser or misuser of the privileges of the charter so as to work a forfeiture is at law and not in equity,¹¹ and any information for the purpose of forfeiting the franchise of a corporation by nonfeasance or malfeasance must be presented under authority of the state.¹²

“A court of chancery has no peculiar jurisdiction over corporations to restrain them in the exercise of their powers, or control their actions or prevent them from violating their charter, in cases where there is no fraud or breach of trust alleged as the foundation of the claim for equitable relief.”¹³

The limitations in a court of equity powers in the absence of statutory provisions in the matter of dissolution of corporations are well expressed by Justice Shipman in Blatchford's United States Circuit Court Report as follows:

“Such a court in the absence of statutory powers is not authorized to dissolve a corporation, or to distribute the assets of a corporation, which is pursuing its ordinary busi-

be done by the state through its officers or through the voluntary surrender by the corporation itself. It must also be noted that the apparent relief asked for in this Michigan case is the appointment of a receiver and an accounting and the winding up of the affairs. But the court's order is that the affairs of the corporation be wound up. This does not technically mean that the charter was forfeited and the corporation dissolved. See also *Brent v. B. E. Brister Sawmill Co.*, 103 Miss. 876, 60 So. 1018, 43 L. R. A. (N.S.) 720; also *Ashton v. Penfield* (1910), 233 Mo. 391, at 426, 135 S. W. 938; *Carson v. Allegheny Window Glass Co.* (1911), 189 Fed. 791, at 796; *Sellman v. German Union Fire Ins. Co.* (1909), 184 Fed. 977, at 978. Says Baldwin, J., of Connecticut: “No statute is needed to give a court of equity power to wind up the affairs

of an insolvent corporation without dissolving it, where such relief is the only mode of doing complete justice between this artificial person and its creditors, in a cause otherwise fully within its jurisdiction, in which all parties in interest are present or represented.” *Barker v. International Co.* (1901), 73 Conn. 587, 48 Atl. 758.

¹¹ *Attorney General v. Utica* (1823), 2 Johns. 371.

¹² *Sleek v. Bloom* (1821), 5 Johns. 366; *Decker v. Gardner* (1891), 124 N. Y. 337, 26 N. E. 814.

¹³ *Ashton v. Penfield*, 233 Mo. 391, 135 S. W. 938; *State, ex rel. Donnell, v. Foster*, 225 Mo. 171, 125 S. W. 184; *Treadwell v. Manufacturing Co.* (1856), 7 Gray, 396; *Pond v. Railway* (1881), 130 Mass. 194, at 195; *Belmont v. Missouri Ry. Co.* (1869), 52 Barb. 168; *Latimer v. Eddy* (1864), 46 Barb. 61.

ness among its shareholders so as to effect a practical and actual dissolution.”¹⁴

(b) **English Decisions.** It was early claimed in England that a corporation created by the act of parliament was compellable by mandamus to do all things which it ought to do and may be restrained by indictment from acting unlawfully; that the governing body being vested by statute in the committee of management, there is in fact, a receiver and manager appointed by the act of parliament itself to perform the functions attributable to such officers and that for the court to appoint a receiver would be an unauthorized interference with a body created by parliamentary authority.¹⁵ In reply to this argument Vice Chancellor William Page Wood says: “The legislature has sanctioned the making of these mortgages in the very forms in which an ordinary mortgage would be made. Are they (the mortgagees) now to be turned around and told they have no remedy except what they would get by applying to two justices to have a receiver appointed? I can not think the legislature intended to sanction such a delusion of parties lending the money to the company.”¹⁶

It was further argued that independent of the argument on the management being in a parliamentary receiver, and on the grounds of public policy connected with that part of the case, the appointment of a receiver of a canal or other corporation with certain public duties to perform is impossible; inasmuch as the court can not prescribe everything which is to be done, and the corporation will be liable to indictment in case the receiver should not carefully keep up the proper repairs of the banks and attend to the other duties imposed by the acts. But there can be no difficulty upon these grounds, says the court.

¹⁴ *Harden v. Newton* (1878), 14 Blatch. 378; *Republican Mountain Silver Mines v. Brown* (1893), 58 Fed. 644, at 648; *Arents v. Blackwell's Durham Tobacco Co.* (1900), 101 Fed. 338, at 344; *Vila v. Grand Island, etc.* (1903), 68 Neb. 222, 63

L. R. A. 791, at 802, 94 N. W. 136, 97 N. W. 613; *Wallace v. Publishing Co.* (1897), 101 Iowa, 313, at 323, 70 N. W. 216.

¹⁵ *Fripp v. Chard Ry. Co.* (1853), 11 Hare, 239, at 250.

¹⁶ *Fripp v. Chard Ry. Co.* (1853), 11 Hare 239, at 252.

“It is a point which frequently arises, and the liberty given to apply is quite sufficient to protect the company against anything which is consequent upon the order made by this court suspending their ordinary powers.”

The result of this decision was that the receiver was appointed of the tolls, rates and duties, and all the rents and profits of the real estate vested in the company with power to appoint agents to collect the same, “the order not interfering too far with the management” of the business.¹⁷ It was later held to the same effect. Where an act of parliament authorizes a corporation to mortgage its tolls, etc., a court of chancery has jurisdiction to appoint a receiver of them, though no such express power is given by the act. But the receiver over such property had committed to him no powers of management which ought properly to be exercised by the corporation itself.¹⁸ Many cases subsequently are now found wherein the English courts have appointed a receiver of a company, not only to receive the income, tolls, etc., from the corporation property but in addition to carry on the business.¹⁹ The English decisions now hold that courts of equity not only have power to appoint a receiver of the tolls of a canal company,²⁰ but also to carry on the business of a corporation.²¹

§ 215. Modern Doctrine—Courts of Equity Have Inherent Power to Appoint Receiver of Corporation. A court of equity has not the power to wind up or dissolve or annihilate an individual nor to take away his civil rights, nevertheless such a court has a right to sequester or take possession of an individual's property.

¹⁷ *Fripp v. The Chard R. Co.* (1853), 11 Hare, 262.

¹⁸ *De Winton v. The Mayor, etc.* (1858), 26 Beav. 533.

¹⁹ *Central Printing Wks. v. Walker*, 24 T. L. R. 88; *In re Tewkesbury Gas Co.* (1911), 2 Ch. 279; *Edwards v. Standard Roll, etc.* (1893), 1 Ch. 574; *In re London*

Pressed Hinge Co. (1905), 1 Ch. 576.

²⁰ *Hopkins v. Worcester, etc., Canal* (1868), L. R. 6 Eq. 447; *McMahan v. North Kent Iron Works Co.* (1891), 3 Ch. 149.

²¹ *In re Leas Hotel Co.* (1902), 1 Ch. 332, at 334; *Edwards v. Standard Roll, etc.* (1893), 1 Ch. 574.

"In the absence of statutory enlargement of equity jurisdiction, a receiver of a corporation will not be appointed unless the same relief would be given, when claimed in an action against an unincorporated association of natural persons."²²

So a court of equity, in the absence of statute, has no right to wind up or dissolve or annihilate a corporation²³ or deprive it of its right to live, given it by the legislature. Nevertheless, it is held on good authority that a court of equity has inherent power to sequester or take possession of the property of a corporation²⁴ as it has the right and power to take the property of an individual for the purpose of preserving it²⁵ and realizing it for the mortgagee or other creditor.

We have no federal statute authorizing courts of equity to appoint a receiver of a corporation, yet the United States reports are full of cases where equity courts have appointed receivers of corporations.²⁶

"A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but in law, it is as distinct as being as an individual is and is entitled to hold property, if not contrary to its charter, as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same."²⁷

²² Barber v. International Co. of Mexico (1901), 73 Conn. 587, at 593, 48 Atl. 758, quoted in Vila v. Grand Island, etc., Co. (1903), 68 Neb. 222, 63 L. R. A. 797, 94 N. W. 136, 97 N. W. 613.

²³ Pride v. Pride Lumber Co., 109 Me. 452, 84 Atl. 989; Union Sav. & Invest. Co. v. District Ct., 44 Utah 397, 140 Pac. 221; Feess v. Merchants State Bank, 84 Kan. 828, 115 Pac. 563, L. R. A. 1915, A. pg. 606 and notes; Conklin v. United States Ship Bldg. Co. (1903), 123 Fed. 917; Folger v. Columbian Ins. Co., 99 Mass. 267; Lowe v. R. P. K. Pressed Metal Co. (1916), 99 Atl. 1.

²⁴ Sellman v. German Union Fire Ins. Co. (1909), 184 Fed. 977, at 978; Carson v. Allegheny Window

Glass Co. (1911), 189 Fed. 791, at 796; Davis v. Gray (1872), 16 Wall. 203, 21 L. ed. 447; Makins v. Percy Watson & Sons (1891), 1 Ch. D. 138; Edwards v. Rolling Stock (1893), 1 Ch. D. 574; In re Victoria Steamboat Co. (1897), 1 Ch. D. 158; In re Leas Hotel Co. (1902), 1 Ch. D. 332; contra, no inherent power, Baker v. Railway Co. (1882), 34 La. Ann. 754, at 757; see also Lowe v. R. P. K. Pressed Metal Co. (1916), 99 Atl. 1.

²⁵ United States Trust Co. v. New York S. Ry. Co. (1886), 101 N. Y. 478, 5 N. E. 316; Decker v. Gardner (1891), 124 N. Y. 338, 26 N. E. 814.

²⁶ See note 31 infra, this section.

²⁷ Hollins v. Brierfield C. & I. Co. (1893), 150 U. S. 382, 37 L. ed. 1113, 14 S. C. Rep. 127.

Of course a court of equity can not operate the business of a corporation beyond the limits or lines set out in the charter of the corporation.²⁸ In other words, a receiver acting under a court order could not operate a steamship line with the property of a railroad corporation when the railroad corporation franchise only authorized its running of a railroad. The first square-toed decision of the United States Superior Court holding that courts of equity have inherent power to appoint a receiver of corporations without a statute, is *Davis v. Gray*, decided in 1872.²⁹ Swayne, J., said: "In some of the states they (receivers) are by statute charged with the duty of settling the affairs of certain corporations when insolvent. As regards the statutes, we see no reason why a court of equity, in the exercise of its undoubted authority, may not accomplish all the best results intended to be secured by such legislation without its aid."³⁰

This case has been followed by many instances of United States courts of equity appointing receivers without statutory power.³¹ United States courts³² and state courts³³ have declared in so many words that courts of equity have inherent power to appoint receivers of corporations.

Contra, We must not fail to call the attention of the reader to the latest expression of the New York Supreme Court on the subject, which is as follows:

"It has long been the settled law of this state that the jurisdiction of chancery does not extend to the sequestration of

²⁸ *Central Trust Co. v. New York C. & N. R. R. Co.* (1888), 110 N. Y. 250, at 257, 18 N. E. 92.

²⁹ *Davis v. Gray* (1872), 16 Wall. 203, 21 L. ed. 447.

³⁰ *Davis v. Gray* (1872), 21 L. ed. 447, 16 Wall. 203.

³¹ *Wallace v. Loomis* (1877), 97 U. S. 146, 24 L. ed. 895; *Miltenberger v. Logansport Ry. Co.* (1882), 106 U. S. 386, 27 L. ed. 117; *Union Trust Co. v. Illinois Midland Co.* (1885), 117 U. S. 458, 29 L. ed. 963; *Sage v. Railway* (1887), 125 U. S. 361, 31 L. ed. 694, 8

S. C. Rep. 887; *Railway Co. v. Humphries* (1891), 145 U. S. 82, 36 L. ed. 632; *Hollins v. Brierfield Coal & I. Co.* (1893), 150 U. S. 382, 37 L. ed. 1113, 14 S. C. Rep. 127; *Towle v. American Bldg. & L. Co.* (1894), 60 Fed. 131; *Hutchinson v. American Palace Car Co.* (1900), 104 Fed. 182.

³² *Carson v. Allegheny Window Glass Co.* (1911), 189 Fed. 791.

³³ *Thompson v. Greeley* (1891), 107 Mo. 589, 17 S. W. 962; *Pilloid v. Angola Ry. & Power Co.* (1910), 46 Ind. Appeals 719, 91 N. E. 829.

the property of the corporation by means of a receiver (*Attorney-General v. Utica Insurance Co.*, 2 Johns. Ch. 371; *Attorney-General v. Bank of Niagara*, Hopkins 354; *U. S. Trust Co. v. N. Y., W. S. & B. Ry. Co.*, 151 N. Y. 478; *Matter of Binghams General Electric Co.*, 143 N. Y. 261, 263).''³⁴

This doctrine had its beginning in 1817 in a statement of Chancellor Kent. The refusal of the court of chancery to entertain jurisdiction of corporate bodies, at the instance of creditors, or to wind up their affairs in case of insolvency, led to the enactment by the legislature in 1825 of the act, chapter 375 of the laws of that year, conferring jurisdiction on courts of chancery to sequester the property of a corporation.³⁵

A long list of cases³⁶ is found based upon the original holding of Chancellor Kent in 1817. However, if the chancellor's statement to the effect that courts of equity have no power to sequester the property of a corporation means that the property of a corporation shall not be taken into custody by a receiver of a court of equity for the purpose of preserving it or realizing it, for the creditors of the corporation, then that statement we believe is not maintained by the weight of authority in America or England, and even by the weight of authority in New York. If Chancellor Kent means, by the word sequester, that a court of chancery can not confiscate a corporation's property to the state then he is sustained by the best authority today.

Andrews, J., of the Supreme Court of New York, in 1886, calls attention to the lack of power of a court of equity to

³⁴ *Matter of Coleman* (1903), 174 N. Y. 373, at 382, 66 N. E. 983; same idea, *Wallace v. Publishing Co.*, 101 Iowa, 313, 322, 70 N. W. 216; cited in *Feess v. Bank* (1911), 84 Kan. 828, at 835, 115 Pac. 563; *Ardmore Nat. Bk. v. Briggs Machine Co.* (1908), 20 Okla. 427, 94 Pac. 533.

³⁵ *United States Trust Co. v. New York, W. S. & B. Co.* (1886), 101 N. Y. 483, 5 N. E. 316.

³⁶ *Smith-Dimmick Lumber Co. v. Teague* (1898), 119 Ala. 385, 24

So. 4; *Murray v. Superior Court* (1912), 129 Cal. 628, 62 Pac. 191; *People v. District Court* (1905), 33 Colo. 293, 80 Pac. 908; *People v. Weigley* (1895), 155 Ill. 491, 40 N. E. 300; *Coquard v. National Lin. Oil Co.* (1898), 171 Ill. 480, 49 N. E. 563; *Wallace v. Pierce Wallace, etc.* (1897), 101 Iowa, 313, 70 N. W. 216; *Vila v. Grand Island, etc.* (1903), 68 Neb. 222, 94 N. W. 136, 97 N. W. 613; *Pond v. F. & L. R. Co.* (1880), 130 Mass. 194.

the property of a corporation by means of a receiver or wind up its affairs or to control or restrain the usurpation of its franchises by corporate bodies or by persons claiming without right to exercise corporate power. Yet says Andrews, J., "The power of a court of chancery to appoint a receiver pendente lite, in a foreclosure case, is a part of its incidental jurisdiction, not depending upon the statute. * * * This jurisdiction is not affected by the character of the mortgagor, whether an individual or a corporation. It rests upon grounds quite independent of the character of the parties to the instrument, or the nature of the mortgaged property."³⁷

"The legal effect of the appointment of a pendente lite receiver of a corporation is to take the property out of the control of the corporation and suspend for the time being all the functions of the corporation,"³⁸ that is, its power to do business; but that does not mean that it forfeits its charter or right to live and again do business. We, therefore, think the law must be, even in New York, that a court of equity really has the inherent power to appoint a receiver pendente lite to take possession or sequester, in the sense of seizing possession of but not title, temporarily, of the property of a corporation. But courts of equity, neither in New York nor elsewhere, without statute, have the power to dissolve corporations or wind up corporations, or take away their franchises.

§ 216. No Receiver of Corporation in Improper Cases Even with Consent. An order for an injunction or a receiver will not be made in an improper case even with the consent of both parties to the suit, more especially where the rights of third parties may be concerned.³⁹

³⁷ United States Trust Co. v. New York, W. S. & B. Co. (1886), 101 N. Y. 482, 5 N. E. 316; Decker v. Gardner (1891), 124 N. Y. 334, 26 N. E. 814.

³⁸ Blum Bros. v. Girard Nat. Bank (1915), 248 Pa. 148, at 156, 93 Atl. 940; Moss Steamship Co., Ltd., v. Whinney (1912), Eng. A.

O. 263; Fluker v. City Ry. Co. (1892), 48 Kan. 580, 30 Pac. 18; Tenth Nat. Bk. v. Construction Co., 227 Pa. 354, 76 Atl. 67; United States Brick Co. v. Reading, 228 Pa. 81, 85, 77 Atl. 395.

³⁹ Whelpley v. Erie Ry. Co. (1868), 6 Blatch. 271.

A recent case is found in the United States District Court for the Southern District of New York wherein the court appointed a receiver of an insolvent corporation with the consent of the defendant corporation under the following statement of facts: The bill alleged that the defendant was engaged in business in New York City and that its assets were largely in excess of \$100,000; that it owed approximately \$140,000 to more than 150 creditors; that it did not have sufficient money to meet its obligations as they fell due and was not able to borrow the money necessary for such purposes, that it was indebted to complainants in certain specified amounts; that unless a receiver were appointed certain creditors would obtain a preference over other creditors and that the assets, consisting of jewelry and silver, would be sacrificed at half their value and great injury would result to creditors.

It therefore asked for the appointment of a receiver. The defendant filed an answer admitting the truth of the allegations contained in the bill and joined in the prayer thereof.⁴⁰

§ 217. No Annuling of Charter of Corporation by Court of Equity. In 1817 Chancellor Kent said, "The jurisdiction of chancery did not extend to control or restrain the usurpation of a franchise by a corporate body. A franchise is given to a corporation by the state through the legislature. Only the state can take away the franchise. Most states provide by statute for the bringing of a quo warranto proceeding by the attorney-general of the state to forfeit the franchise.

§ 218. No Dissolution of Corporation by Court of Equity, Except by Statute. The appointment of an equitable receiver or receiver and manager of a company over the assets and business of the company does not dissolve or annihilate the company.⁴¹ Both continue to exist; but it entirely supersedes the company in

⁴⁰ *Durand & Co. v. Howard & Co.* (1914), 222 Fed. 585.

⁴¹ *Hirschfield v. Reading Finance & Securities Co.* (1912), 82 Atl. 690, 9 Del. Ch. 344.

the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession, or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance.⁴²

A court of equity has no inherent power to dissolve a corporation.⁴³ The authorities are unanimous on this subject. The reason is that the state creates a corporation and the creator or the created are the only ones who can destroy the corporation.⁴⁴ The case of *Miner v. Ice Co.*⁴⁵ seems to hold that an equity court has inherent power to dissolve a corporation but a careful reading discloses that the order made by the court was, "A receiver will be appointed, and the affairs of this corporation wound up." Winding up the affairs of an individual or corporation does not necessarily mean the annihilation of the individual or corporation.

A court of equity can not kill or destroy an individual, neither can it destroy a corporation, but it can take possession of the business and property of an individual, to preserve or realize for creditors and it can take possession of the business and property of a corporation and preserve it or realize it for creditors, and in doing so, leave nothing but the shell of the corporation. It can not destroy that shell, however, except by statute.

§ 219. No Dissolution Except by Creating State. A foreign state may appoint an ancillary receiver or an original receiver for the local assets of a corporation within that state. Such a

⁴² *Moss Steamship Co., Ltd., v. Whinney* (1912), Eng. A. C. 263.

⁴³ *Attorney General v. Utica Ins. Co.* (1817), 2 Johns. Ch. 371; *French Bank Case* (1879), 53 Cal. 550; *Lowe v. R. P. K. Pressed Metal Co.* (1916), 99 Atl. 1; *Hardon v. Newton*, 14 Blatch. 376, Fed. Cases No. 6054; *Elizabethtown*

Gaslight Co. v. Green, 46 N. J. Eq. 118, 18 Atl. 844; *Pride v. Lumber Co.*, 109 Me. 452, 84 Atl. 989.

⁴⁴ *Deneke v. New York & R. Line*, etc. (1880), 80 N. Y. 605.

⁴⁵ *Miner v. Ice Co.* (1892), 93 Mich. 111, 53 N. W. 218; *Ashton v. Penfield* (1910), 233 Mo. 391, at 426, 135 S. W. 938.

local court is necessarily without authority, statutory or otherwise, to dissolve the corporation.⁴⁶

220. Dissolution of Private Corporation by Vote of Majority of Stockholders. There can be no doubt that a corporation established solely for trading and manufacturing purposes even without statute has the right by a vote of the majority of its stockholders to wind up its affairs and close its business, if in the exercise of a sound discretion it deems it expedient so to do. At common law, the right of a corporation acting by a majority of these stockholders to sell their property is absolute, and is not limited as to objects, circumstances, or quantity. To this general rule there are many exceptions arising from the nature of particular corporations, the purposes for which they were created and the duties and liabilities imposed on them by their charters. Corporations established for objects quasi public, such as railway, canal and turnpike corporations, to which the right of eminent domain and other large privileges are granted in order to enable them to accommodate the public, may fall within the exception, also charitable and religious bodies, in the administration of whose affairs the community or some portion of it has an interest to see that their corporate duties are properly discharged. But it is not so with corporations of a private character, established solely for trading and manufacturing purposes. Neither the public nor the legislature have any direct interest in their business or its management. These are committed solely to the stockholders, who have a pecuniary stake in the proper conduct of their affairs. By accepting the charter, they do not undertake to carry on the business for which they are incorporated indefinitely, and without any regard to the condition of their corporate property. Public policy does not require them to go on at a loss. On the contrary, it would seem very clearly for the public welfare as

⁴⁶ *Lowe v. R. P. K. Pressed Metal Co.* (1916), 99 Atl. 1; see *Heitkamp v. American Pigment Co.*, 158 Ill. App. 587.

well as for the interest of the stockholders that they should cease to transact business as soon as, in the exercise of a sound judgment, it is found that it can not be prudently continued.⁴⁷ Most states provide by statute how corporations may be dissolved.

Contra, Earl, J., of the New York Supreme Court says, "All the stockholders uniting might undoubtedly surrender the franchises of the corporation and with its dissolution. But can a portion of them do this in the absence of statutory authority?⁴⁸ There is no statute in this state (New York) which authorizes a portion of the stockholders to maintain an action to dissolve a manufacturing corporation and I know of no decision holding that they can."

§ 221. Effect of Dissolution of Corporation on Pending Suits.

There can be no valid judgment against a dissolved corporation unless one is founded on a pending suit which the order of dissolution itself preserves from abatement, or one in some manner saved.⁴⁹ Statutes in many states provide especially for the continuance of the corporation for the purpose of suit or otherwise save causes of action against the corporation.

One state, by statute, may act upon property of a foreign corporation within its territory, though the foreign corporation has been actually dissolved in the state where created.⁵⁰

The foreign state, though it can not by its statute give extra-territorial effect to its laws, can treat a foreign corporation though civilly dead as *de facto* alive for the purpose of a remedy within their own limits.⁵¹

§ 222. Receiver of Assets of Corporation after Dissolution.

After a company has been dissolved or wound up, either out

⁴⁷ Per Biglow, J., in *Treadwell, etc., v. Salisbury* (1856), 7, Gray, 393, at 404.

⁴⁸ *Deneke v. New York & R. Line, etc.* (1880), 80 N. Y. 605.

⁴⁹ *Robinson v. Mutual Reserve Life Ins. Co.* (1910), 182 Fed. 850, at 855; *Pendleton v. Russell* (1891), 144 U. S. 640, at 646, 36 L. ed. 447, 12 S. C. Rep. 743; *Sturgis v.*

Vanderbilt, 73 N. Y. 384; *Rogers v. Insurance Co.* (1895), 148 N. Y. 34, at 38, 42 N. E. 515.

⁵⁰ *Rogers v. Insurance Co.* (1895), 148 N. Y. 34, at 38, 42 N. E. 515; *Life Ins. Co. v. Fassett*, 102 Ill. 315.

⁵¹ *Rogers v. Insurance Co.* (1895), 148 N. Y. 34, at 38, 42 N. E. 515; *Life Ins. Co. v. Fassett*, 102 Ill. 315.

of court, or within court, and no longer exists, it can not hold property. The early decisions held that upon such an event the property was forfeited to the crown or the state. Most states now provide by statutes for the continuance of suits for or against corporations after dissolution and for the appointment of a receiver or liquidator after the company is dissolved to hold the property and to pay out and distribute the property as the law specifically provides. This receiver is peculiarly a statutory receiver and not an equitable receiver, so-called. He is called into being only by reason of the statute and, therefore, his powers and duties are to be ascertained by and from the statute.

§ 223. Receiver to Wind Up Affairs of Corporation without Dissolution. A creditor of a corporation may seek relief in equity and have the assets of a corporation preserved or realized by a receiver and applied to the creditor's claims. If all the assets of the corporation are thus applied, the corporation is practically extinct, yet the corporate entity created by the sovereign power still remains and may be resuscitated and revived by the stockholders.

Suppose, however, that all the debts of a corporation have been paid and there is money or property belonging to the corporation, what right, if any, has a stockholder to come into a court of equity and ask for the winding up of the business of the corporation by a distribution of the assets?

It is the peculiar province of a court of equity not only to right wrongs already committed, but to protect property from future injury and waste by withdrawing it from the reach of danger when the protecting arm of the court has been invoked by litigation concerning the property in question. In the case of a wilful breach of trust the court not only compels the guilty trustee to restore the trust property, but removes it from the possession and control of the custodian who has proved untrustworthy.⁵³

⁵³ *Fougeray v. Cord* (1892), 50 N. J. Eq. 185, at 199, 24 Atl. 499.

Said Thayer, District Judge of the United States Circuit Court of Appeals, Eighth Circuit, in 1893, speaking for the court: "A court of chancery may at the instance of a stockholder, and if the company itself refuses to move, lawfully entertain a bill to depose or to restrain the officers or directors of a corporation when it appears that in their capacity as agents or trustees of the stockholders they have committed or are about to commit acts that are tantamount to a breach of trust, whether such acts consist of fraudulent dealings with the corporate property or funds, or whether they consist in engaging the corporation in enterprises that are beyond the scope of its chartered powers."⁵⁴

"But a court of equity has no power to interpose its authority for the purpose of adjusting controversies that have arisen among the shareholders or directors of a corporation relative to the proper mode of conducting the corporate business, as it may do in case of similar controversy arising between the members of an ordinary partnership. They have a legislative power when the directors or shareholders are duly convened that is fully adequate to settle all questions affecting their business interests or policy and they should be left to dispose of all questions of that nature without applying to the courts for relief. A stockholder in a corporation can not successfully invoke the powers of a chancery court to control its officers or board of managers, or to wrest the corporate property from their charge through the agency of a receiver, so long as they neither do nor threaten to do any fraudulent or ultra vires acts and so long as they keep within the limits of bylaws which have been prescribed for their governance. If in either of the cases last specified a stockholder is nevertheless dissatisfied with the business policy that is being pursued, or the methods of corporate management, he must seek redress within the corporation, in the mode prescribed by its charter and by-

⁵⁴ Republican Mountain Silver Mines v. Brown (1893), 58 Fed. 644, at 647.

laws rather than by an appeal to the court.”⁵⁵ The only exception to the rule that a stockholder must apply to the directors and also if need be to the corporation, for redress of a wrong done the corporation and thus indirectly to the stockholders, before he can sue in a court of equity, for himself and on behalf of other stockholders, is when it appears that such application would be unavailing to protect his rights.⁵⁶

Although the stockholders of a corporation agree when they become stockholders that in the management of the business they will abide by the will of the majority, nevertheless there is no doubt of the power of a court of equity, in case of fraud, abuse of trust, or misappropriation of corporate funds, at the instance of a single stockholder, to grant relief and compel restitution, and where the holders of the majority of the stock control the directorate, and are themselves the wrongdoers, without any showing that the directors have been requested, or the corporation has refused to act.⁵⁷

It is undoubtedly the law that a court of equity can not go so far as to declare a dissolution.⁵⁸ Can, however, in extreme cases, the court order the property of the corporation after the debts have been paid, to be distributed among its stockholders at the instance of one or more minority stockholders, thus winding up the affairs of the company?

There are many instances in which minority stockholders' rights can only be properly protected by the intervention of a court of equity and the appointment of a receiver and winding up of the business. Courts are now granting such relief

⁵⁵ *Republican Mountain Silver Mines v. Brown* (1893), 58 Fed. 644, at 647.

⁵⁶ *Dunphy v. Travelers News Asso.* (1888), 146 Mass. 495, at 498, cases cited, 16 N. E. 426; also *Ulmer v. Real Estate Co.* (1899), 93 Me. 324, at 327, 45 Atl. 40; *Minona Cement Co. v. Reese* (1910), 167 Ala. 485, 52 So. 523; *Ellerman v. Railway* (1891), 49 N. J. Eq. 217, 23 Atl. 287.

⁵⁷ *Miner v. Ice Co.* (1882), 93 Mich. 97, at 112, 53 N. W. 218, cases cited: *Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 827; *Ashton v. Penfield* (1910), 233 Mo. 391, at 426, 135 S. W. 938, cases cited; *Brent v. Sawmill Co.* (1912), 103 Miss. 876, 60 So. 1018; *Cantwell v. Columbia Lead Co.*, 199 Mo. 1, 97 S. W. 167.

⁵⁸ *Ashton v. Penfield* (1910), 233 Mo. 391, at 426, 135 S. W. 938.

and we think rightfully,⁵⁹ provided they act with great caution and when the directors are guilty of fraud or what is tantamount to fraud or are acting *ultra vires*.⁶⁰

Private trading corporations are created for the purpose of gain, the production of income; and when they cease to be profitable, or are exposed to danger of insolvency, the stockholders who have large or small interests at stake are not obliged to continue the business,⁶¹ provided the directors or managers are acting fraudulently or *ultra vires* or doing acts which are tantamount to such.⁶²

Stockholders between themselves occupy to a great extent the position of copartners,⁶³ the directors or managers are the trustees or managing partners and the stockholders are the *cestuis que trust* and as such have an interest in all the property of the corporation.

§ 224. Receiver Not Ordinarily Appointed to Carry on Business of Corporation. Courts are not established for the carrying on of private enterprises. It is not one of their proper functions to supply agencies for the conduct of a business for the profit of parties litigant, and they have no magic touch whereby they can transmute insolvency into solvency, or render productive that which was unproductive. Power is given to

⁵⁹ *Foss v. Harbottle*, 2 Hare, 491; *Miner v. Ice Co.* (1892), 93 Mich. 97, 53 N. W. 218; *O'Connor v. Knoxville Hotel Co.* (1894), 93 Tenn. 708, 28 S. W. 308; *Thoroughgood v. Georgetown Water Co.* (1910), 9 Del. Ch., 77 Atl. 720; *Fougeray v. Cord* (1892), 50 N. J. Eq. 185, at 200, 24 Atl. 499; *Klugh v. Coronaca Milling Co.* (1902), 66 S. C. 100, 44 S. E. 566; *Noble v. Gadston L. & Imp. Co.* (1901), 133 Ala. 250, 31 So. 856; see *Bixler v. Summerfield* (1902), 195 Ill. 147, 62 N. E. 84.

⁶⁰ As laid down by Thayer, *United States Judge*, in *Republican Moun-*

tain Silver Mines v. Brown, 58 Fed. 644, at 647.

⁶¹ *Arents v. Blackwell's Durham Tobacco Co.* (1900), 101 Fed. 338, at 346; *Hayden v. Directory Co.*, 42 Fed. 875; *Treadwell v. Manufacturing Co.*, 7 Gray, 393.

⁶² *Arents v. Blackwell's Durham Tobacco Co.* (1900), 101 Fed. 338, at 345.

⁶³ *Fougeray v. Cord* (1892), 50 N. J. Eq. 185, at 200, 24 Atl. 499; *Robinson v. Smith*, 3 Paige, 222, at 232; *Pratt v. Pratt* (1866), 33 Conn. 446; *contra*, *Republican Mountain Silver Mines v. Brown* (1893), 58 Fed. 644, at 647.

them to appoint receivers, but it is a power to be sparingly exercised, and only in cases where the interests of justice imperatively demand it, for it is no light thing to wrest property from the hands of its owners.⁶⁴

The courts, in England, when the question was first presented to them, hesitated to appoint a receiver and manager of a joint stock trading company. Kay, J.,⁶⁵ states the proposition as follows: "The object of such application as this is to enable the business of the company to be carried on, and supposing the receiver and manager did so fairly, his acts would bind the company. So that the result is, that if the business turned out to be a losing one the uncalled capital (if any) might have to be called to pay up such losses. In my opinion that would be very strong, indeed, and if this had been the first case of the kind, I should hesitate very much to accede to such an application."

Yet Kay, J., permitted a receiver of such a company and the case has been frequently followed.⁶⁶

§ 225. Receiver May Sometimes be Appointed to Carry on Business of Corporation. The decisions in the United States having once gone so far as to hold that courts of equity have inherent power to appoint a receiver of a corporation, have impliedly held that such a receiver could run the business of a corporation when the court in its discretion should make an order for the running of the same.⁶⁷

The English decisions first decided that courts of equity could appoint a receiver to receive the rents and profits and tolls and duties of a corporation and the property thereof. Following this they began to hold with some hesitation that the courts could go a step farther and order the receiver to

⁶⁴ *Trust & Deposit Co. v. Spartenburg W. Wks. Co.* (1898), 91 Fed. 324.

⁶⁵ *Makins v. Percy Ibolson & Sons* (1891), 1 Ch. D. 138.

⁶⁶ *Edwards v. Rolling Stock,*

etc. (1893), 1 Ch. D. 574; *In re Victoria Steamboats Co.* (1897), 1 Ch. D. 158; *In re Leas Hotel Co.* (1902), 1 Ch. D. 332.

⁶⁷ *Gay v. Hudson River Electric Power Co.* (1909), 173 Fed. 1003.

carry on the undertaking or business. It must be said that carrying on a business by the court is sometimes necessary to preserve the property to keep alive the trade and good name. By keeping a business alive, it may be sold at the proper time as a going concern and as an entirety, and much more money realized for the creditors than if it were closed down, the trade and good name all lost and the assets sold piecemeal. There are examples where a business has been run by the receiver at a loss and where the assets are reduced rather than increased by this process; on the other hand there are cases where a receiver has run a business, even at no profit, yet sold out as a going concern at a good price. Whenever the receiver sees that he is not making a profit he should at once report to the court and ask for instructions.

In England a marked distinction is made between a receiver who merely takes the income and pays necessary outgoings, and a manager appointed by the court who carries on the trade or business. As in the case of a mine, for instance, "If a receiver only was appointed, the working of the mine was stopped; but if it was desired to continue the making of the mine, a receiver and manager was necessary."⁶⁸

The court does not undertake to manage businesses, and when it appoints a manager to run a business, as distinguished from a receiver, it does so with a view to sale.⁶⁹ "The duty of the manager is only to manage for the purpose of realization and until he can conveniently realize."⁷⁰

If a receiver and manager is appointed of a business, it is his duty to protect the good will and to guard against the destruction of the business or injury to the good will.

When a receiver and manager is appointed, there are really two separate properties comprised in a security of this kind. First, the property of which a receiver only is appointed; and

⁶⁸ *In re Manchester & M. Ry. Co.* (1880), C. A. 14 Ch. D. 645, at 653.

⁶⁹ *Whitley v. Challis* (1892), 1 Ch. D. 69; *In re Newdigate Colliery, Ltd.* (1912), C. A. 1 Ch. D. 472;

Taylor v. Neate (1888), 39 Ch. D. 544; *Gutterson & Gould v. Lebanon I. & S. Co.* (1907), 151 Fed. 71.

⁷⁰ *In re Leas Hotel Co.* (1902), 1 Ch. D. 331.

secondly, the good will of the business of which a manager is appointed.⁷¹

§ 226. Receiver of Public Utility Corporations. A public utility corporation owes duties to the community in consideration of the rights and franchises conferred upon it. When a corporation organized by private persons to construct and operate works of general public utility, such as railroad, gas and electric plants, waterworks, irrigation plants, etc., and receives aid from the public by the grant of valuable franchises or public bounties, or a monopoly or a delegation of the right of eminent domain and other rights, these rights and privileges are subject to an implied condition that the public utility corporation shall assume the obligation to fulfill the public purpose and serve the public.

Because such corporations are serving the public in performing public duties, their property is not subject to seizure and sale by creditors as fully as property of private persons or strictly private corporations.⁷²

Receivers may be and frequently are appointed of public service corporations, such as railroads,⁷³ electric railroads and traction companies,⁷⁴ street railroads,⁷⁵ water companies,⁷⁶ irrigation companies,⁷⁷ gas and electric companies.⁷⁸

§ 227. Effect of Appointment of Receiver to Carry on Business of Corporation. The appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company any more than the taking possession by the mortgagee of the fee of land let to tenants annihilates the mortgagor—both continue to exist; but it entirely

⁷¹ *In re Newdigate Colliery, Ltd.* (1912), C. A. 1, Ch. D. 472.

⁷² *Thoroughgood v. Georgetown Water Co.* (1910), 9 Dcl. Ch. 84, 77 Atl. 720.

⁷³ See ch. XV, *infra*.

⁷⁴ *St. Louis Trust Co. v. Riley* (1895), 70 Fed. 32.

⁷⁵ *In re Reisenberg* (1907), 208 U. S. 90, 52 L. ed. 403, 28 S. C. Rep. 219.

⁷⁶ *Thoroughgood v. Water Co.* (1910), 9 Del. Ch. 84, 77 Atl. 720.

⁷⁷ *Atlantic Trust Co. v. Chapman* (1907), 208 U. S. 360, 52 L. ed. 528, 28 S. C. Rep. 406.

supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge or otherwise dispose of the property put into the possession, or under control of the receiver and manager. Its powers in these respects are entirely in abeyance.⁷⁹

§ 228. Powers and Duties of Receiver to Carry on Business of Corporation. Says Chitty, J., "The manager must carry on the business, and carrying on the business involves entering into contracts. What the nature of the contracts is is another thing, but still they are, according to law, contracts. Suppose that a business which is very prosperous has to be sold as a going concern, there is a large amount of stock which in the ordinary course is worked up for the purpose of sale. It was suggested, and indeed argued, that a manager could not employ persons to work that stock up but must leave it as it stood at the moment of dissolution,⁸⁰ in other words, he must starve the business; must not carry it on but stop it. In some businesses there are sales across the counter, and many things must be done in the business which involve new contracts of some nature. Put a case of a job master, a business which involves keeping a large number of horses; some may go out on contract in the usual way. Some are kept in the stable for letting to regular or chance customers. To say that there can be no dealing with those horses would be an absurd proposition, because the manager would have to keep them in the stables; he must feed them, and in order to feed them he must buy corn. In my judgment a business of that sort must be carried on in the ordinary way. A manager does not speculate with business but he carries it on according to the general course of business in the particular trade."⁸¹

⁷⁹ Lord Atkinson, in *Moss S. S. Co. v. Whinney* (1912), A. C. 263; *Buchanan v. Hicks* (1911), 98 Ark. 370, 136 S. W. 177; Arkansas statute involved, see *Blum Bros. v. Girard Natl. Bk.* (1915), 248 Pa. St. 156, at 157, 93 Atl. 821, cases cited.

⁸⁰ *Taylor v. Neate* (1888), Chitty, J., 39 Ch. D. 544.

⁸¹ *Taylor v. Neate* (1888), Chitty, J., 39 Ch. D. 544. See sec. 225 *supra*.

§ 229. Ancillary Receivers of Corporations. A corporation may do business in all places where its charter allows and the local laws do not forbid.⁸² Yet the corporation itself "must dwell in the place of its creation, and can not migrate to another sovereignty."⁸³ This being so, corporations do business all over the United States and even elsewhere. When a corporation does business outside of the state creating it, it frequently has property and assets, both real and personal, outside of such creating state.

An equitable receiver *pendente lite* may be appointed over the assets of a corporation whenever they may be found, as is the case of the assets of an individual. The appointment of a receiver of the assets of the corporation, however, does not mean necessarily extinction or even control of the corporation entity. The control and winding up and destruction of the corporation entity can only be accomplished in the state which created the corporation.⁸⁴

When application is made for the appointment of an ancillary receiver of a corporation, the court to which it is addressed exercises its own original jurisdiction.⁸⁵ The decree of the court of the domicile of the corporation is evidence in every other state that the corporation is insolvent and on that ground alone or many others and that a proper case exists in that state for the appointment of a receiver and it is to be respected accordingly in obedience to the constitutional provision whereby full faith and credit is to be given in each state to the records and judicial proceedings of every other state of the Union. But it is for the court to which the application is made to decide what remedy it should extend in the particular case and whether the proper administration of the assets requires the appointment of a receiver.⁸⁶ Ordinarily in

⁸² *Railroad v. Koontz* (1881), 104 U. S. 812; *Canada v. Gebhard* (1883), 109 U. S. 527, at 537, 27 L. ed., 1020, 3 S. C. Rep. 363.

⁸³ *Bank of Augusta v. Earle* (1839), 13 Pet. 588; *Canada v. Gebhard* (1883), 109 U. S. 527, at

537, 27 L. ed. 1020, 3 S. C. Rep. 363.

⁸⁴ *Lowe v. R. P. K. Pressed Metal Co.* (1916), 99 Atl. 1.

⁸⁵ *Lowe v. R. P. K. Pressed Metal Co.* (1916), 99 Atl. 1.

⁸⁶ *Sands v. E. S. Greeley & Co.* (1898), 88 Fed. 132.

comity to the proceedings of another court of co-ordinate jurisdiction, it will appoint an ancillary receiver, and assume administration in aid of the primary receiver.⁸⁷ When it appoints a receiver, the officer becomes its officer and is completely amenable to its control, and it matters not whether he is called ancillary receiver or merely receiver. His title to assets within the jurisdiction is derived from its decree and does not depend upon comity. The assets are in its custody and are to be disposed of as equity and the orderly administration of justice require. Its judgments and decrees in respect to these assets must be accepted as conclusive by all other courts.⁸⁸

While it is the better and usual practice for the domiciliary receiver to be first appointed, nevertheless the local court has jurisdiction to wind up the business located in the local forum,⁸⁹ although it can not, of course, wind up and dissolve the corporation itself. For jurisdictional purposes there is distinction to be drawn between the power to appoint a so-called ancillary receiver and an original receiver.⁹⁰

§ 230. Comity in the Matter of Appointment of Receiver of Corporation. The right to collect personal assets everywhere belonging to a corporation is generally given to the receiver under his orders, when primarily appointed. This right may be exercised beyond the jurisdiction of the appointing court, not as a matter of right, but by virtue of comity which may be extended to him by the court of the state in which the right is asserted. This comity will not be extended where the rights of the citizens of the state are likely to be prejudiced or where it would be in contravention of the policy of the state.⁹¹

⁸⁷ *Trust Co. v. Miller* (1880), 33 N. J. Eq. 155; *Sands v. E. S. Greeley* (1898), 88 Fed. 133.

⁸⁸ *Reynolds v. Stockton* (1890), 140 U. S. 254, 35 L. ed. 464, 11 S. C. Rep. 773.

⁸⁹ *Lowe v. R. P. K. Pressed Metal Co.* (1916), unoff. 99 Atl. 1.

⁹⁰ *Lowe v. R. P. K. Pressed Metal Co.* (1916), 99 Atl. 1; *Sands v. E. S. Greeley & Co.*, 88 Fed. 132, at 133.

⁹¹ *Irwin v. Granite State P. Asso.* (1897), 56 N. J. Eq. 246, 38 Atl. 680; *Lewis v. American Naval Stores Co.* (1902), 119 Fed. 391.

When an application is made for the appointment of an ancillary receiver for a foreign corporation which is already in the hands of a receiver at the place of its domicile, the court in which the application is made can do one of three things: First, it can refuse to appoint a receiver and let the domiciliary receiver bring suit in the state to collect all the debts of the corporation within its limits; second, it can appoint the domiciliary receiver as ancillary receiver if the statutes do not prevent; third, it can appoint some one other than the domiciliary receiver.⁹²

“The law as recognized in the circuit courts of the United States is that, when the federal court of jurisdiction at the domicile of the corporation appoints a receiver, or makes a decree winding up a corporation and disposing of its assets, a decree of foreclosure or any other decree looking to a disposition of its property, thereupon, assuming that to aid another federal court involves a federal question which will lawfully support the exercise of jurisdiction by the federal judiciary, the Circuit Courts in other circuits will exercise ancillary jurisdiction and assist in carrying out the purpose of the court at the place of domicile.”⁹³

When a court of ancillary jurisdiction has authorized its receiver to incur debts owing to residents within its jurisdiction, and has impliedly pledged the faith of the court to their payment, it may and ought to exercise a jurisdiction independent of that of the original jurisdiction to secure payment of its debts of administration out of the property within its custody.⁹⁴ An order of the court of original jurisdiction which in effect prevents this may properly be disregarded.⁹⁵

§ 231. When Title to Property of Corporation Is in Receiver.⁹⁶ When a court of equity appoints a receiver it does

⁹²Irwin v. Granite State P. A. (1897), 56 N. J. Eq. 246, 38 Atl. 680.

⁹³Conklin v. United States Ship Bldg. Co. (1903), 123 Fed. 913; see Shinney v. North American Se-

curity Co. (1899), 97 Fed. 11.

⁹⁴Sands v. E. S. Greeley & Co. (1898), 88 Fed. 133.

⁹⁵Kirker v. Owings (1899), 98 Fed. 511.

⁹⁶See ch. XIV.

so acting in personam. A court of equity by a mere order in personam can not divest the title of an individual to property, neither can it divest the title of a corporation unless the sovereign power over the property has by statute made the appointment of a receiver to divest the property,⁹⁷ or the statute has made the receiver a quasi trustee.⁹⁸

RECEIVER APPOINTED AT INSTANCE OF STOCKHOLDERS

§ 232. Stockholders Have No Relief at Law against Directors.^{98a}

The general rule of law is that an action at law must be brought by the person having the title or right to the thing demanded, or to the damages which are sought to be recovered for the injury. Hence the corporation should bring an action at law against directors, agents, or trustees of the corporation which misappropriates property or does other wrongful acts. It is the property of the corporation which has been misappropriated and lost, and the damages to be recovered belong to it—to be sure in trust for creditors and possibly in trust for stockholders, but for all of them and not for some of them exclusively. The corporation must sue. It may compromise and settle or release a defendant on terms mutually satisfactory which a stockholder can not do, and should he do it, it would be no bar to a suit afterward brought by the corporation. The directors, agents or trustees of the corporation may be liable to the corporation as any other agents, trustees or other person would be for robbing the corporation or defrauding it or in any way injuring the corporate property. To permit a stockholder to recover for himself to the extent of the loss which he suffers in his stock would be the means of giving him a preference to which he is not entitled. The entire duty of the directors growing out of their office is owed to the corporation, which, under its charter, is the sole representative of the stockholders and the legal protector of their property. Nor is

⁹⁷ See *Buchanan v. Hicks* (1911), 98 Ark. 370, 136 S. W. 177.

⁹⁸ See *Converse v. Hamilton* (1911), 224 U. S. 243, 56 L. ed. 749, 32 S. C. Rep. 415.

36 S. C. Rep. 233, affirming *Fleitmänn v. v. United Gas, etc.* (1914), 211 Fed. 103. See *Equity Suit allowed in United Coffee Co. v. Amal Coffee Co.* (1916), 244 U. S. 261, at

any other protection or defender necessary until the bank shall neglect its duty in refusing to call the directors to account, in which event, upon a case properly stated and with proper parties before the court, a court of equity may grant relief according to the existing exigency.⁹⁹

§ 233. Stockholders' Relief in Equity against Directors.

(a) **General Rule.** Under the English law and the laws of the United States, the directors are made the governing body of a corporation subject to the superior control of the proprietors or stockholders assembled in general meeting; and the proprietors or stockholders so assembled have power, due notice being given of the purposes of the meeting, to originate proceedings for any purpose within the scope of the company's powers, as well as to control the directors in any acts which they have originated.

The corporation in a sense is the *cestui que trust* and the directors are the trustees. The corporators or stockholders have power through a majority to bind the whole body and every individual corporation or stockholder must be taken to have come into the corporation upon the terms of being liable to be so bound.¹

Says the English chancery court, cited with approval by our supreme court, "Nothing connected with the internal disputes between shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent, unless there is something *ultra vires* on the part of the company *qua* company, or on the part of the majority of the company, so that they are not fit persons to determine it, but that every litigation must be in the name of the company, if the company really desire it."²

⁹⁹ *Allen v. Curtis* (1857), 26 Conn. 461.

¹ *Foss v. Harbottle* (1843), 2 Hare, 461, at 494; *Wheeler v. Pullman* (1892), 143 Ill. 207, 32 N. E. 420.

² *MacDougal v. Gardiner* (1875), 1 Ch. D. 21; *Mason v. Harris* (1879), 11 Ch. D. 107; *Hawes v. Oakland* (1881), 104 U. S. 456, 26 L. ed. 827; see 39 L. R. A. (N.S.) 1032.

“Because there may be a great many wrongs committed in a company, there may be claims against directors, there may be claims against officers, there may be claims against debtors, there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation, and it is the company, as a company, which has to determine a subject-matter of litigation, or whether it will take steps to prevent the wrong from being done.”³

A bill or information by a stockholder or stockholders of a corporation to be relieved in respect of injuries which the corporation has suffered at the hands of persons standing in the situation of a director or others in a fiduciary relationship to the company charging that the defendants were concerting and effecting various fraudulent and illegal transactions whereby the property of the company was misapplied, aliened and wasted, can not ordinarily be maintained.*

Such an alleged injury is against the whole corporation by individuals whom the corporation entrusted with powers to be exercised only for the good of the corporation. Such injuries are against the corporation and not directly against the individual stockholders or the aggregate members of the corporation since in law the corporation and the members thereof are not one and the same.⁵

Said Sessions, United States District Judge, E. D. Michigan S. D., in 1912:⁶ “Under some circumstances and conditions a court of equity will enjoin the majority of directors and stockholders of a corporation from making and entering into a particular contract or pursuing a particular course of conduct, but the case would have to be extreme to warrant the issuance of an injunction restraining corporate action unless assented to and sanctioned by all the stockholders. Such restraint

³ MacDougall v. Gardiner (1875), 1 Ch. D. 22; Hawes v. Oakland (1881), 104 U. S. 456, 26 L. ed. 827, 39 L. R. A. (N.S.) 1032. See United Coffee Co. v. Amal Coffee Co. (1916), 244 U. S. 261, at 263, 61 L. ed. —, 37 S. Ct. Rep. 509.

⁵ Hoss v. Harbottle (1843), 2 Hare, 461, at 490.

⁶ Smith v. Chase & Baker Piano Mfg. Co. (1912), 197 Fed. 466, at 471; see where receiver was appointed in Zeckendorf v. Steinfield (1911), 225 U. S. 445, 56 L. ed.

would necessarily result in transferring the management of corporate affairs from the majority to the minority and would place the corporation and all persons interested therein at the mercy of the smallest minority stockholder.”

(b) Exceptions to General Rule. In 1855 Wayne, J., announced the American doctrine as follows: “It is now no longer doubted either in England or the United States, that courts of equity, in both, have a jurisdiction over corporations, at the instance of one or more of their members, to apply preventative remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capital or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the jurisdiction extends to inquire into and to enjoin as the case may require that to be done, any proceedings by individuals in whatever character they profess to act, if the subject of complaint is an imputed violation of a corporate franchise or the denial of a right growing out of it, for which there is not an adequate remedy at law.”⁷

A shareholder may sometimes on behalf of himself and other shareholders file a bill against directors and have a receiver appointed. If this can be done in partnerships why should it not be done in the matter of a company when the necessity of the case demands it? Said Lord Chancellor Cottenham, “It is the duty of a court of equity to adapt its practice and course of proceeding to the existing state of society and not by too strict an adherence to forms and rules, established under different circumstances to decline to administer justice and to enforce rights upon which there is no other remedy.”⁸

⁷ Wayne J. Dodge v. Woolsey (1855), 18 How. 341, citing *Am-liffe v. Manchester*, 2 Russ. & Mylne, 480 N.; *Ware v. Grand Junction*, 2 Russ. & Mylne, 470; *Bagshaw v. Eastern*, etc., 7 Hare, ch. 114; also *March v. Railway Co.* (1860), 40

N. H. 567; see *Zeckendorf v. Steinfield* (1911), 225 U. S. 445, 56 L. ed. 1156, 32 S. Ct. Rep. 728.

⁸ *Wallworth v. Holt* (1841), 4 My. & Cr. 635; see *Davis v. Jacksonville & P. Ry. Co.* (1913), 180 Ill. App. 1, at 13.

Corporations of a private nature are in truth little more than private partnerships, and in cases which may be easily suggested, it would be too much to hold that a society of private persons associated together in undertakings which, though certainly beneficial to the public, are nevertheless matters of private property, are to be deprived of their civil rights, *inter se*, because, in order to make their common objects more obtainable, the crown or legislature may have conferred upon them the benefit of a corporate character. If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained except that of a suit by individual corporators in their private character and asking in such character the protection of those rights to which in their corporate character they were entitled, I can not but think that the principle so forcibly laid down by Lord Cottenham in *Walworth v. Holt*⁹ and other cases would apply and the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.¹⁰ "A stockholder, in his character of stockholder can not sue, nor unless specially made liable by the charter, can he be sued for any of the company's transactions. There is one case and one only in which he can interfere, and that is where the officer and managers of the company, by fraud and collusion with third persons, are sacrificing, or are about to sacrifice and betray the interests of the corporation. For such breach of trust and conspiracy, he can call the guilty parties to an account in a court of equity."¹¹

The corporation may call its officers to account if they wilfully abuse their trust, or misapply the funds of the company, and if it refuses to sue, or is still under the control of those who must be made defendants in the suit, the stock-

⁹ *Walworth v. Holt* (1841), 4 My. & Cr. 635.

¹⁰ Vice Chancellor Wigram, in *Foss v. Harbottle* (1843), 2 Hare, 489; *Featherstone v. Coote* (1873),

16 Eq. Cases, 298; *Schmitt v. Johnson* (1912), 166 Ill. App. 638.

¹¹ *Forbes v. The Memphis, etc., Ry.*; *Bradley, J.* (1872), 2 Woods (U.S.) 323, at 331.

holders who are the real parties in interest may file a bill in their own names, making the corporation a party defendant; or a part of them may file a bill in behalf of themselves and all others standing in the same relation.¹²

An expression of the law by a Massachusetts court is as follows: "It is unquestioned that at law no action could be maintained by the stockholder of a company against the directors of a corporation for fraud and conspiracy wherein the interests of the corporation have been sacrificed, otherwise than in the name and by the authority of the corporation itself. Ordinarily the same rule would apply in equity. It is only from necessity of the case and to prevent a failure of justice that suits in equity may sometimes be brought by a stockholder or stockholders against the directors or other agents or trustees of the corporation. To justify a suit in such a form, the bill must show that suitable redress is not attainable through the action of the corporation. To this extent, all authorities agree."¹³

"There is some diversity as to what will satisfy that requirement. Whether there must be an effort to move the corporate body to the redress of its own injuries, and to that end an attempt to procure a meeting and vote of the stockholders, or whether an application to the present board of affairs by whom the corporate affairs are managed, and a refusal by them to allow proceedings in its name and behalf would be sufficient does not seem to have been determined by any clear concurrence of decision. It may depend somewhat

¹² Robinson v. Smith (1832), 3 Paige, 322; Peabody v. Flint (1863), 6 Allen, 56; Hardon v. Newton (1878), 14 Blatch. 376, at 379; Dodge v. Woolsey (1855), 18 How. 331; Bacon v. Robertson (1855), 18 How. 480; Heath v. Erie Ry. (1871), 8 Blatch. 347; Pond v. Vermont Ry. (1874), 12 Blatch. C. C. R. 280; La Grange v. State Treas. (1872), 24 Mich. 468; Fees v. Merchants State Bank

(1911), 84 Kan. 828, 115 Pac. 563, L. R. A. (1915), 606; State v. Shelton (1911), 142 S. W. 417, at 421, 238 Mo. 281, at 294; Ashton v. Penfield, 233 Mo. 391, 135 S. W. 938, and cases cited at p. 426; Sellman v. German Union Fire Ins. Co. (1909), 184 Fed. 977, at 978; Carson v. Allegheny Window Glass Co. (1911), 189 Fed. 791, at 796.

¹³ Brewer v. Boston Theatre (1870), 104 Mass. 386; see United Coffee Co. v. Amal Coffee Co.

upon the character of the corporate organization and the extent of powers confided to its officers for the time being. Where the stockholders retain no control of the corporate business, except by means of an annual election of officers, those officers during their term of service represent the corporation for all purposes, and a refusal by them to take proper action for the protection of its interests, or to allow the use of the corporate name for that purpose, ought to be sufficient to justify a proceeding in behalf of the individual stockholders, making the corporation a party defendant. A formal application and refusal need not be alleged, if enough appear to show that such an application would be unavailing. When the directors themselves are the parties charged with the wrong, or by whose fraud or wilful collusion the wrong has been accomplished, and the suit is to be brought against them, they are by the very nature of the case incapacitated for the service of representing the corporation in any action for the restoration of its rights whether by suit or proceedings in pais. If the corporate action is under the control of such parties it is a sufficient reason of necessity to warrant proceedings by suit in the name and behalf of the individual stockholders."¹⁴

(c) Relief on Ground of Mismanagement and Fraud. Courts of equity do, independent of statute, appoint receivers of corporations when a proper suit is pending for final relief. Such courts will do so when gross mismanagement, positive misconduct, or other grounds show a breach of trust on the part of the officers of the corporation.¹⁵

Said the Supreme Court of Missouri in 1906: "Courts have

¹⁴ *Brewer v. Boston Theatre* (1870), 104 Mass. 387; see *Miner v. Ice Co.* (1892), 93 Mich. 112, cases cited, 53 N. W. 218.

¹⁵ *Thoroughgood v. Georgetown W. Co.* (1910), 77 Atl. 720, Del. Ch.; *Fongeray v. Cord*, 50 N. J. Eq. 185, 24 Atl. 497; *Cantwell v. Lead Co.*, 199 Mo. 1, 97 S. W. 167; *Ponca*

Mill Co. v. Mikesell, 55 Neb. 98, 75 N. W. 46; *Vila v. Grand Island*, etc., 68 Neb. 232, 94 N. W. 136; *Brent v. B. E. Brister Sawmill Co.* (1913), 43 L. R. A. (N.S.) 720, 60 So. 1018, 103 Miss. 876, where the court held it could wind up the affairs of the company, not necessarily dissolve it.

hesitated to lift the affairs and assets of a corporation out of the hands of its board of directors and administer them through receivers, and have flatly said so and given cogent reasons for this hesitancy. *Thompson v. Greeley*, 107 Mo. 1, 586 et seq.; *State ex rel., Attorney General v. Peoples' United States Bank*, 197 Mo. 574. But when all this has been said, it may further be said that this court has never denied power in a chancellor to prevent a scheme of irreparable injury and wrong, merely because the movers in that scheme speak and act in a corporate capacity rather than in an individual capacity. That solvent corporations are wrecked for purely selfish and illegal purposes, that minority interests are "frozen out," that business immorality has run amuck under the assumption that courts are powerless, is too true. But the assumption is wrong. Judicial hesitancy does not mean judicial atrophy or paralysis. The board of directors of a corporation are but trustees of an estate for all the stockholders and may not only be amenable to the law personally, for a breach of trust, but their corporate power under color of office to effectuate a contemplated wrong may be taken from them when by fraud, conspiracy or covinous conduct, or extreme mismanagement the rights of minority stockholders are put in imminent peril and the underlying, original and corporate entente cordiale is unfairly destroyed. It would be a sad commentary on the law if, when the trustee of a corporate estate is making an improper disposition of it, or has shown improper partiality toward one of its conflicting parties or has put the estate in a fix it is liable and likely to be either wasted or destroyed, or mercilessly taken from all and given to a part, a court could not reach out its arm and preserve and administer the estate. We have so declared the law."¹⁷

(d) Relief on Ground That Corporation Has Failed to Elect Officers. If the majority of the stockholders of a corpora-

¹⁷ *Cantwell v. Lead Co.* (1906), 199 Mo. 1. at 42 and 43, 97 S. W. 167.

tion neglect to elect directors of the corporation, the minority are not to be the sufferers in consequence of such neglect. Under such circumstances a receiver may be appointed to take charge of the offices of the company and preserve them for the stockholders generally¹⁸ when a bill is filed against the company and its directors asking for some final relief, such as injunction, accounting or otherwise.

(e) Relief on Ground That Corporate Property Has Been Abandoned. Courts of equity have power to preserve property when such power is invoked by proper litigation before the court. The only reason which may be suggested why the property of a corporation may not be taken and preserved by a court of equity as well as the property of an individual is that the sovereign has said who shall hold the property, therefore the courts can not step in and take away power given by the legislature. But when the property of a corporation has been abandoned, or those who are authorized by the legislature refuse to take hold, then this objection does not obtain.¹⁹

Even in jurisdictions where it is held that courts of equity have no jurisdiction to appoint receivers for corporations in the absence of express statutory authority, there is this recognized exception to that ruling, namely, that such courts have inherent authority in cases of extreme necessity such as when the corporate property has been abandoned.²⁰

(f) Relief on Ground That Objects of Corporation Are Unattainable. Said Bradford, District Judge of the Circuit Court, District of Delaware in 1909: "The board of directors of a corporation is charged by law with the control and management of its business and affairs, and when the law-making power has declared that the business and affairs of a corpora-

¹⁸ *Lawrence v. Greenwich Fire Insurance Co.* (1829), 1 Paige, 587; *Finney v. Bennett* (1876), 27 Gratt. 365, at 370.

¹⁹ *Tennessee Mountain, P. & M. Co. v. Ayres* (1897), Court of Ch.

App. of Tenn., 43 S. W. 744; *Central Land Co. v. Sullivan* (1907), 152 Ala. 360; *Cramer v. Bird* (1868), L. R. 6 Eq. 143, at 148.

²⁰ *Baker v. Railway Co.* (1882), 34 La. Ann. 755, at 757.

tion, created and organized under that power, shall be directed by its board of directors, it ill becomes courts created for the administration of the law, unless under special and peculiar circumstances, to declare that its business and affairs shall not be directed by such board. But special or peculiar circumstances may sometimes exist, fully warranting and justifying a receivership of a corporation technically or substantially solvent. If it has become impossible for the corporation to answer any of the ends of its creation and it has thus utterly failed of its purpose, a court of equity would, under its general jurisdiction and powers, and wholly aside from any statutory provision in that behalf, be authorized to wind up its business and affairs, for the benefit of those really interested, namely, its creditors and stockholders, although not involving a dissolution or termination of the corporate franchise.”²¹

§ 234. Stockholders Suing Directors Managing One Corporation to Detriment of Another. “If the directors or other agents or trustees of the corporation in whom the control of its affairs are entrusted are themselves guilty of wrong against the corporation either by personal conversion of its funds, or being interested in another corporation or business, fraudulently manage the affairs of the corporation to its detriment and for the benefit of the other corporation or concern, a court of equity will upon proper bill filed, interfere, at the suit of a stockholder, to protect his interest in the corporation, without requiring him to first request or demand that the guilty agents or officers or trustees proceed virtually against themselves.”²³

²¹ *Sellman v. German Union Fire Ins. Co. of Baltimore* (1909), 184 Fed. 977, at 978; see *Carson v. Allegheny Window Glass Co.* (1911), 189 Fed. 791, at 796; *Central Land Co. v. Sullivan* (1907), 152 Ala.

360, 44 So. 644; *Ross v. American Banana Co.* (1907), 150 Ala. 268, 43 So. 817; *State v. Shelton* (1911), 238 Mo. 281, at 295, 142 S. W. 417.

²³ *Wheeler v. Pullman, etc.* (1892), 143 Ill. 207, 32 N. E. 420.

§ 235. Stockholders' Suit against Directors Should Be in Name of Company. There is no doubt that a stockholder has a remedy for losses sustained by the fraudulent acts, and for the misapplication or waste of corporate funds and property by any officer or officers of a corporation. Such action, however, must be brought in the name of the company unless such corporation or its officers, upon being applied to for such a purpose by a stockholder refuse to bring such action. In that contingency and then only, can a stockholder bring an action for the benefit of himself and others similarly situated, and in such an action the corporation must necessarily be made a party defendant. When a stockholder brings such an action, the complaint should allege that the corporation on being applied to refuses to prosecute; and as this averment constitutes an essential element of the cause of action, the complaint is insufficient without it.²⁴

Ordinarily a stockholder has not a right to sue in his own name or use the name of the corporation of which he is a stockholder without authority from the corporation to ask that the corporation be wound up or for other relief. Yet where a corporation has for years done no business, had elected no officers or directors, a stockholder was allowed to file a bill on behalf of the corporation asking for an injunction against waste on the property of the corporation and for the recovery of land for the use of the corporation.

§ 236. Stockholders' Suit against Directors Should Make Company a Defendant. If after the proper exertion made to have the corporation to obtain redress, it has been found incapable of doing it, or has improperly or collectively refused to do it, the incorporators or stockholders might perhaps obtain redress by making such corporation a party defendant, but

²⁴ Greaves v. Gonge (1877), 69 N. Y. 154; Talbot v. Scripps (1875), 31 Mich. 268; Brewer v. Boston Theatre (1870), 104 Mass. 378;

Russell v. Wakefield W. W. (1875), 20 L. R. E. Cases, 474; Mason v. Harris (1879), 2 Ch. D. 97.

unless it is made a party, it would be improper for the court to proceed. If the defendant directors or other agents or fiduciary officers should settle their accounts with the stockholders' plaintiffs, the corporation would not be bound by it, nor would any payment made by them be good against the corporation.²⁵

It is an implied condition of the association of stockholders in a corporation that the majority shall have power to bind the whole body as to all transactions, within the scope of the corporate powers.²⁶

§ 237. Minority Stockholders Seeking Relief against Majority. A holder of shares in an incorporated body, so far as his individual rights and interests may be involved in the doings of the corporation acting within the legitimate sphere of its corporate power, has no other legal control over them than that which he can exercise by his single vote in the meetings of the company. To this extent, he has parted with his personal right or privilege to regulate the disposition of that portion of his property which he has invested in the capital stock of the corporation, and surrendered it to the will of a majority of his fellow corporators. The *jus disponendi* is vested in them so long as they keep within the line of the general purpose and object for which the corporation was established, although their action may be against the will of a minority, however large.²⁷

Says Wallace, J.: "It can not be denied that minority stockholders are bound hand and foot to the majority in all matters of legitimate administration of the corporate affairs; and the courts are powerless to redress many forms of oppression practiced upon the minority under the guise of legal sanction, which fall short of actual fraud. This is a consequence of the

²⁵ Hersey v. Veasie (1844), 24 Me. 12; Greaves v. Gonge (1877), 69 N. Y. 154.

²⁶ Erwin v. Oregon Ry. (1884), 20 Fed. Rep. 580.

²⁷ Durfee v. Railway (1862), 6 Allen, 242; Bill v. Western Union Tel. Co. (1883), 16 Fed. 19.

implied contract of association by which it is agreed in advance that a majority shall bind the whole body as to all transactions within the scope of the corporate powers. But it is also of the essence of the contract that the corporate powers shall only be exercised to accomplish the objects for which they were called into existence, and that the majority shall not control those powers to prevent or destroy the original purposes of the corporations.”²⁸

“A stockholder, either minority or majority, has a right to insist that the corporation entity shall not continue as a cloak for a fraud upon him, and shall not longer retain his capital to be used for the sole advantage of the owner of the majority of the stock, and a court of equity will not so far tolerate such a manifest violation of the rules of natural justice as to deny him the relief to which his situation entitled him.”²⁹

§ 238. Receivers Appointed in Stockholders' Suits against Corporations. When a stockholder has a right which is being violated by the directors or other agents or trustees of the corporation and comes within the cases outlined in the above paragraphs of this work, he may bring the proper suit in equity to have that right protected. After he has brought that suit the court may at its discretion appoint a receiver to preserve or realize the property of the corporation. The receivership is merely a conservative provision incidental to the main object of the bill.³⁰ It is the duty of the court to take such steps as would secure to the minority stockholders their right to the property and a receivership may be the proper remedy.³¹

²⁸ *Erwin v. Oregon Ry., etc.* (1886), 27 Fed. 630; *Gregory v. Patchett* (1864), 33 Beav. 595.

²⁹ *Miner v. Ice Co.* (1892), 93 Mich. 97, at 117, 53 N. W. 218; see *Menier v. Hooper Tel. Wks.* (1874), L. R. 9 Ch. App. Cas. 350; see *Russell v. Wakefield W. Wks.* (1875), L. R. 20 Ch. App. Cas. 474; *Gray v. New York & S. V. Co.* (1875), 3 Hun (N.Y.) 833.

³⁰ *The People v. Weigley* (1895), 155 Ill. 491, at 502, 40 N. E. 300; *Heitkamp v. American Pigment, etc.* (1910), 158 Ill. App. 587, at 595; *Aiken v. Colorado, etc.* (1896), 72 Fed. 593.

³¹ *The Wayne Pike Co. v. Hammons* (1891), 129 Ind. 368, 27 N. E. 487.

It is impossible to reconcile with the present accepted ideas of equity and receivership any case which holds that a court can grant a receivership as a final relief because no litigant has an absolute right to a receivership. A receivership is neither a right by contract nor a right by operation of law. A receivership is a provisional remedy exercised by a court of equity at its discretion.

If a litigant has no right which has been violated he is not entitled to bring an action and incidentally have a receivership. If a litigant has a right which has been violated he can assert it and ask for a receivership incidentally. When a court holds that a litigant can not ask for a receivership as a final relief it deprives the litigant of no right for the litigant never has a right to a receivership. A number of cases may be found which apparently hold that a litigant as final relief may ask for a receiver and the winding up of the corporation.³²

A careful reading, however, of these cases will disclose that in most of such cases the complainant asked for some final relief such as to stop the fraudulent and illegal transactions of the company and to compel an accounting³³ or to procure the rescission of a fraudulent contract and the cancellation of spurious stock.³⁴

The final relief generally demanded is the setting aside of some transaction, an injunction and an accounting. A complainant stockholder may ask an injunction against actions of the directors or trustees, the appointment of a receiver, and accounting,³⁵ or shareholders may bring suit against the corporation and its officers and directors to set aside an assignment

³² *Ross v. South Delaware Gas Co.* (1914), 10 Del. Ch. 236, 89 Atl. 593; *Brent v. B. E. Brister Sawmill Co.*, 103 Miss. 876, 60 So. 1018, 43 L. R. A. (N.S.) 720, wherein the court appointed a receiver at the instance of a minority stockholder and wound up the business of the corporation; *Columbia, etc., v. Washed, etc.* (1905), 136 Fed. 710; *Miner v. Ice Co.* (1892).

93 Mich. 112, 53 N. W. 218; *Lowe v. R. P. K. Pressed Metal Co.* (1916), 99 Atl. 1.

³³ *Aiken v. Colorado, etc.* (1896), 72 Fed. 591.

³⁴ *DuPuy v. Terminal Co.* (1882), 82 Md. 408, 34 Atl. 910; *Cameron v. Imp. Co.* (1898), 20 Wash. 169, 54 Pac. 1128.

³⁵ *Earle v. Railway Co.* (1893), 56 Fed. 909, at 915.

made by such directors and officers and ask for the restoration of the assets to the corporation. In such a case a receiver may be appointed *pendente lite* to preserve the assets.³⁶

Said Van Fleet, V. C.: "The power of this court to appoint a receiver of a corporation either because it has no properly constituted governing body, or because there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business with advantage to its stockholders, I think must be regarded as settled but it is equally well settled that this power is subject to certain limitations, namely, it must be exercised with great caution and only for such time and to such extent as may be necessary to preserve the property of the corporation and protect the rights and interests of the stockholders."³⁷

Where there is no person authorized to hold the corporate property, the majority of stockholders failing to elect directors, then it is clear that the court should appoint a receiver to take charge of and preserve the effects of the corporation. This may be done on application of minority stockholders,³⁸ or by creditors.³⁹

In order to give the court authority to set aside the action of the majority or board of directors, legally acting under the rules of the company, legally adopted, there must appear injustice or oppression or circumstances amounting to fraud. A receiver should only be appointed in cases of actual wrong, injustice and injury in the management of any business.⁴⁰

RECEIVER OF CORPORATION AT INSTANCE OF CREDITORS

§ 239. Creditors Generally Seeking Appointment of Receiver of Corporation. "A party may deal with a corporation in respect to its property in the same manner as with an individual

³⁶ Powers v. Blue Grass Bldg. Asso. (1898), 86 Fed. 705.

³⁷ Edison v. Edison U. P. Co. (1894), 52 N. J. Eq. 620, at 625, 29 Atl. 195; see Aldrich v. Union Bag & Paper Co. (1913), 81 N. J. Eq. 244, 87 Atl. 65.

³⁸ Lawrence v. Greenwich F. Ins. (1829), 1 Paige, 587.

³⁹ Doborn v. Simonton (1878), 78 N. C. 63.

⁴⁰ Green v. Felton (1908), 42 Ind. App. 675, 84 N. E. 166.

owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien. The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to account for fraud or sometimes even mere mismanagement in respect thereto but as between itself and its creditors the corporation is simply a debtor and does not hold its property in trust or subject to a lien in their favor in any other sense than does an individual debtor."⁴¹

A simple contract creditor, therefore, has no more right to ask for a receiver of the property of a corporation debtor than for the property of an individual debtor.⁴² "In the absence of a statutory enlargement of equity jurisdiction, a receiver of a corporation will not be appointed, unless the same relief would be given, when claimed in an action against an unincorporated association of natural persons."⁴³

§ 240. Grounds Generally for the Appointment of Receiver of Corporation. Since a party may deal with a corporation in respect to its property in the same manner as with an individual owner,⁴⁴ he may, as a creditor, judgment creditor,^{44a} or lienholder, bring action and have a receiver appointed over the property of the corporation on the same grounds as he may bring an action against an individual and have a receiver appointed of his property.

Many states have statutes indicating the grounds on which a receiver will be appointed of the property of individuals and of corporations. These statutes generally are little more than codifications of the usages and rules of equity on the subject⁴⁵ and with few exceptions the grounds for the appointment of an equitable receiver are the same with or without a statute.

⁴¹ *Hollis v. Brierfield Coal & C. Co.* (1893), 150 U. S. 371, 37 L. ed. 1113.

⁴² *Hollins v. Brierfield Coal & C. Co.* (1893), 150 U. S. 371, 37 L. ed. 1113, 14 S. C. Rep. 127.

⁴³ *Barber v. International Co.* (1901), 73 Conn. 593, 48 Atl. 758.

⁴⁴ *Hollins v. Brierfield Coal & C. Co.* (1893), 150 U. S. 371, 37 L. ed. 1113, 37 L. ed. 1113, 14 S. C. Rep. 127.

^{44a} *John W. Cooney Co. v. Arlington Hotel Co.* (1917), 101 Atl. 879.

⁴⁵ *Douglas v. Kline* (1877), 12 Bush (Ky.) 608.

§ 241. Insolvency as a Ground for the Appointment of Receiver of Corporation. The appointment of a receiver is not a matter of course following upon a decree of the court declaring the company insolvent or an admission that the corporation is insolvent.⁴⁶ Courts of equity are not courts of insolvency and have not peculiar jurisdiction over corporations merely because they are insolvent. However, when a proper suit is filed in a court of equity "the court will not leave the management of the affairs of the corporation in the hands of the directors unless it is shown to be for the interest of the creditors and stockholders that this be done."⁴⁷

A receiver for a business corporation will not be appointed on behalf of general creditors upon mere allegations of insolvency, unaccompanied by any charge of fraud, mismanagement or wasting of assets, whereby plaintiff's claim would be imperiled, especially so when plaintiff's affidavits as to insolvency are opposed by other affidavits denying the fact and alleging that the appointment of a receiver would be injurious to the interests of all parties, including creditors.⁴⁸

While an insolvent corporation, or one that being insolvent has made an illegal conveyance of property, or one whose officers have mismanaged their trust, may still be capable of continuing its business and of accomplishing the object for which the corporation was formed and may be so engaged and is, therefore, exempt from judicial interference at the suit of general creditors yet when it clearly appears that on account

⁴⁶ Forsell v. Pittsburg & M. C. Co. (1911), 42 Mont. 412, at 421, 113 Pac. 479; Continental Trust Co. v. Brown (1915), 179 S. W. 939; Stacey v. McNicholas (1915), 148 Pac. 67; see where receiver appointed where insolvent with consent of corporation, Durand v. Howard (1914), 222 Fed. 585.

⁴⁷ Blum Bros. v. Girard National Bank (1915), 248 Pa. 148, at 156, 93 Atl. 940; Cowen v. Pennsylvania

Glass Co., 184 Pa. 1, 38 Atl. 1075; United States Brick Co. v. Reading Shale Co., 228 Pa. 81, at 87, 77 Atl. 395; Nichols v. Perry Patent Co. (1856), 11 N. J. Eq. 126.

⁴⁸ Gartrell v. McCravey, et al. (1915), 144 Ga. 249, 86 S. E. 932; Atlanta & C. Ry. Co. v. Carolina P. C. Co. (1913), 140 Ga. 650, 79 S. E. 555; Lawrence Iron Works v. Rockbridge Co. (1891), 47 Fed. 755.

of such insolvency and misconduct of its officers the corporation is no longer able to proceed with its business, or its assets are in progress of being fraudulently misapplied to the injury of creditors who are without adequate means of relief it becomes the duty of the court to appoint a receiver.⁴⁹ Although the property of a private corporation is not charged by law with any direct trust or specific lien in favor of general creditors and although such a corporation so long as it is in the active exercise of its functions, may if not restrained by its charter or by statute, exercise as full dominion and control over its property, having due regard to the objects of its creation as an individual may exercise over his property, when it becomes insolvent, and has no purpose of continuing business, the power to sell, dispose of and transfer its estate is not altogether without limitation.⁵⁰

When creditors, although they have not secured a judgment, or return of execution and nulla bona, nevertheless allege a violation of trust, dissipation and concealment of assets, conspiracy, confederation and fraud, and the allegations are not denied, it may be a proper case for the appointment of a receiver.⁵¹

The Supreme Court of the United States has not flatly decided that insolvency alone of a corporation is ground for a receiver on application of a simple contract creditor. However, it has appointed receivers in a number of cases where insolvency and other factors existed. The continuation of insolvency and the other factors frequently constitutes cause for a receiver.

In *Brown v. Lake Superior Iron Co.*⁵² (1889), the corporation was insolvent. Its extensive and scattered properties had been brought into single ownership and so operated

⁴⁹ *Doe v. Northwest C. & T. Co.* (1894), 64 Fed. 928; *Trust & Deposit Co. v. Spartenburg Wks.* (1898), 91 Fed. 324.

⁵⁰ *Sutton Mfg. Co. v. Hutchinson* (1894), 63 Fed. 496.

⁵¹ *Merchants N. B. v. Chattanooga Const. Co.* (1892), 53 Fed. 314.

⁵² *Brown v. Lake Superior Iron Co.* (1889), 134 U. S. 530, 33 L. ed. 1021, 10 S. C. Rep. 604.

together that large benefit resulted in preserving the unity of ownership and operation. Disintegration threatened through separate attacks by different creditors on scattered properties. The preservation of this unity, and its consequent value, and the operation of the properties for the benefit of all the creditors equally were matters deserving large consideration in any proper suit. Receiver was appointed. In *re Metropolitan*,⁵³ simple creditors at large were allowed to bring suit and have receiver appointed of Metropolitan Railroad of New York City where "a refusal to appoint a receiver would have led in this instance, almost inevitably to a very large and useless sacrifice in value of a great property operated as one system through the various streets of a populous city and such a refusal would also have led to endless confusion among the various creditors in their efforts to enforce their claims and to very great inconvenience to the many thousands of people who necessarily use the road every day of their lives."

In *New England Co. v. Carnegie Steel Co.*,⁵⁴ the bill alleged that the corporation (railroad company) was insolvent and that its system was in danger of being broken up and asked no final relief and no relief except the appointment of receivers to hold the system intact and to protect the corporation from creditors. It was one of those anomalous proceedings so common in such cases which the supreme court has never formerly approved of or disapproved and which have been tolerated on account of the public and general interests involved for which legislatures have given no protection under such emergencies. Occasional criticism has been expressed against the courts for retaining proceedings of this class.

Solvency Not Always Prevents Appointment of Receiver of Corporation. While insolvency alone will not generally

⁵³ In *re Reisenberg* (1907), 208 U. S. 90, 52 L. ed. 403, 28 S. C. Rep. 219; see also *American Can*

Co. v. Erie Preserving Co. (1909), 171 Fed. 540, at 541.

⁵⁴ *New England Co. v. Carnegie Steel Co.* (1896), 75 Fed. 54.

be sufficient grounds for the appointment of a receiver, so solvency alone will not always be sufficient to prevent the appointment of a receiver. Said Bradford, United States Circuit Judge, Circuit Court of Delaware: "Special and exigent circumstances may in the absence of a statute, warrant and justify a receivership of a corporation although solvent, for the purpose of winding up its affairs and distributing its assets, or of temporarily taking charge of and protecting its property and managing its business and affairs. If it has become impossible for the corporation to answer the ends of its creation and it has thus utterly failed of its purpose, a court of equity would, under its general jurisdiction and powers and wholly aside from any statutory provision in that behalf be authorized to wind up its business and affairs for the benefit of those really interested, namely, its creditors and stockholders, although not involving a dissolution or termination of the corporate franchise. So although the legitimate purposes of a corporation may not have become impossible of accomplishment, if the facts clearly disclose such fraudulent, wilful, reckless mismanagement of its business and affairs by its board of directors as to produce a conviction that further control of the corporation by the same board would result in the destruction of its business and insolvency, or cause great and unnecessary loss to its creditors or stockholders, a receivership may be properly constituted."⁵⁵

It has been held by the United States Circuit Court for the Western Division of New York that "ordinarily a receiver can not be appointed for a corporation at the instance of a creditor who has not recovered a judgment upon his claim and exhausted his legal remedy, yet where a defendant who is confessedly insolvent has waived the objection that a complainant is not a judgment creditor there is no longer room for doubting the

⁵⁵ Carson v. Allegheny Window Glass Co. (1911), 189 Fed. 791, at 796; Sellman v. German Union Fire Ins. Co. (1909), 184 Fed. 977, at

978; see under Alabama act where failure to show insolvency prevented receivership, Ross v. Am. Banana Co. (1907), 100 Ala. 268, 43 So. 817.

jurisdiction of a federal court of equity to appoint a receiver." 56

§ 242. Simple Contract Creditor Generally Can Not Have Receiver of Corporation. Since a party may deal with a corporation in respect to its property in the same manner as with an individual owner,⁵⁷ and since a simple contract creditor can not without further reasons have a receiver appointed over the property of an individual, he likewise can not have a receiver appointed over the property of a corporation.⁵⁸

Not the insolvency of the corporation, nor the execution of an illegal trust deed nor the failure to collect all stock subscriptions nor all together gave to these simple contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon.⁵⁹

Not having any lien on its property or charge or any direct trust therein, such creditor has simply a common-law remedy and unless he can show in addition some reason for the appointment of a receiver, he must pursue his common-law remedy.⁶⁰

The objection to an application for the appointment of a receiver that execution upon a judgment in favor of the creditor has not been issued and returned unsatisfied, is one which must be made in limine and which may be waived by the defendant corporation.⁶¹

An insolvent corporation, with large properties scattered in different states, having for the purpose of keeping those properties together as a whole, consented to the filing of a

⁵⁶ *American Can. Co. v. Erie Pres. Co.* (1909), 171 Fed. 540, at 541.

⁵⁷ *Hollins v. Brierfield Coal & C. Co.* (1893), 150 U. S. 371, 37 L. ed. 1113, 14 S. C. Rep. 127.

⁵⁸ *Nowell v. International Trust Co.* (1909), 169 Fed. 497, at 503.

⁵⁹ *Hollins v. Brierfield Coal & C. Co.* (1893), 150 U. S. 371, 37 L. ed. 1113, 14 S. C. Rep. 127.

⁶⁰ *Hollins v. Brierfield Coal & C. Co.* (1893), 150 U. S. 371, 37 L. ed. 1113, 14 S. C. Rep. 127.

⁶¹ *In re Reisenberg* (1907), 208 U. S. 30, at 109, 52 L. ed. 403, 28 S. C. Rep. 219; *American Can Co. v. Erie Preserve Co.* (1909), 171 Fed. 540, at 541; *D. A. Tompkins Co. v. Catawba, etc.* (1897), 82 Fed. 780, at 783; *Hollins v. Iron Co.* (1893), 150 U. S. 380, 37 L. ed. 1113, 14 S. C. Rep. 127; *Brown v. Lake Superior Iron Co.* (1889), 134 U. S. 530, 33 L. ed. 1021, 10 S. C. Rep. 604; *Enos v. New York, etc.* (1900), 103 Fed. 47.

creditor's bill by three creditors (the debts of two of them not having matured and no execution having been issued on that of the third, and having assented to the appointment of a receiver under that bill and having for nine months remained inactive while the receiver was managing the property and assuming liabilities in reducing it to possession, can not at the expiration of that time when the great majority of creditors have become parties to the suit, and its property is about to be ratably distributed by the court among creditors, interpose the objection of want of jurisdiction, on the ground that a court of equity could not obtain jurisdiction when the plaintiff creditors had plain, adequate and complete remedies at common law, or that their debts had not been converted into judgments, or that no execution had issued and been returned nulla bona—whatever weight might have been given to those defenses if interposed in the first instance.⁶²

§ 243. Simple Contract Creditor of Dissolved Corporation Having Receiver of Corporation. Chief Justice Waite, of the Supreme Court, said: "Ordinarily, a creditor must put his demand into judgment against his debtor and exhaust his remedies at law before he can proceed in equity to subject choses in action to its payment. To this rule, however, there are some exceptions, and we are not prepared to say that a creditor of a dissolved corporation may not under certain circumstances claim to be exempted from its operation. If he can, however, it is upon the ground that the assets of the corporation constitute a trust fund which will be administered by a court of equity in the absence of a trustee; the principle being that equity will not permit a trust to fail for want of a trustee."⁶³

§ 244. Judgment Creditor Having Receiver Appointed of Corporation. A receiver of a corporation may be appointed in an equitable proceeding at the instance of a judgment

⁶² Brown v. Lake Superior Iron Co. (1880), 134 U. S. 530, 33 L. ed. ⁶³ Terry v. Anderson (1877), 95 U. S. 628, at 636, 24 L. ed. 365.

creditor. Such a creditor's suit is ancillary to the main suit. In such creditor's suit, the court assumes the administration of the estate,⁶⁴ and in effect may wind up the corporation, although the technical winding up of the corporation and the dissolution of the same may only be done under special statute or as otherwise provided by the law of the state creating the corporation.

§ 245. Secured Creditors Having Receiver Appointed of Corporation. The appointment of a receiver at the instance of an equitable incumbrancer, at any rate where nothing is presently payable to him, is, no doubt, matter of discretion.⁶⁵ The only relevant consideration would seem to be whether, as between the company and the debenture holder, it is just and convenient that the company's authority to dispose of its assets in the ordinary course of business should be stopped. As between those parties, it would seem reasonable that the authority should be stopped if its continuance would injure the debenture holder. Jeopardy of the security then becomes relevant.⁶⁶ Danger to the security by anticipated acts of an execution creditor is good reason for a receiver.⁶⁷

§ 246. Secured Creditors Bringing Foreclosure Proceedings Having Receiver of Corporation. Mere insolvency of a corporation and inability of the corporation to pay the interest coupons as they mature may give a right to the mortgagees or bondholders to bring foreclosure proceedings, but if there is no evidence of mismanagement or waste or carelessness or fraud, wantonness or collusion, or some ground to apprehend that the property will suffer deterioration or serious injury, some-

⁶⁴ *White v. Ewing* (1894), 159 U. S. 36, at 37, 40 L. ed. 67, 15 S. C. Rep. 1018.

⁶⁵ *Carshalton Park Estate, Ltd.* (1908), 11 Ch. 567; *Thorn v. Nine Reefs, Ltd.* (1892), 67 L. T. 93; *In re London Pressed Hinge Co., Ltd.* (1905) 1 Ch. D. 582; *Pacific*

Coast Pipe Co. v. Conrad City Water Co. (1917), 245 Fed. 846.

⁶⁶ *In re London Pressed Hinge Co., Ltd.* (1905), 1 Ch. D. 583.

⁶⁷ *In re London Pressed Hinge Co., Ltd.* (1905), 1 Ch. D. 583; *Wildy v. Mid. Hants Ry. Co.*, 16 W. R. 409.

thing to show that there is danger of probable loss or that some rights may be substantially impaired, then the court may not appoint a receiver.⁶⁸ It may be that the property pledged may be better taken care of under the management of the officers of the corporation than under a receiver.

“Courts of equity always have the power where the debtor is insolvent and the mortgaged property is an insufficient security for the debt, and there is good cause to believe that it will be wasted or deteriorated in the hands of the mortgagors, as by cutting of timber, suffering dilapidation, etc., to take charge of the property by means of a receiver and preserve, not only the corpus, but the rents and profits for the satisfaction of the debt.”⁶⁹

Where a trustee of a mortgage covering corporation property is by its terms authorized to take possession of the property upon default, but refuses to do so, and a foreclosure suit is filed by the holders of the mortgage bonds, the court may appoint a receiver to take possession of the property.⁷⁰

§ 247. Simple Contract Creditors of Dissolved Corporation Having Receiver Appointed. Statutes in most states provide for the appointment of a receiver of the assets of a dissolved corporation. In case there is no such statute, we have the situation of property and no legally constituted person to hold such property. Such property is in an analogous position to property of a deceased person before an executor or administrator has been appointed. Courts of equity will appoint a receiver in a proper case to take care of property of a dissolved corporation with or without a statute therein providing.

⁶⁸ *Trust & Deposit Co. v. Spartanburg* (1898), 91 Fed. 324; *Pilloid v. Angola Ry. & Power Co.* (1910), 46 Ind. App. 719, 91 N. E. 829.

⁶⁹ *Kountze v. Omaha Hotel Co.*

(1882), 107 U. S. 378, at 395, 27 L. ed. 609, 2 S. C. Rep. 911.

⁷⁰ *Warner v. Rising Fawn Iron Co.* (1878), 29 Fed. Cas. 261.

CHAPTER XV

RECEIVERS OF RAILWAYS

ANALYSIS

- § 248. No Receivers of Railways in England Except by Statute.
- § 249. Receivers of Railways in United States without Statute.
- § 250. Appointment of Receiver of Railway by State Court—Lines within State.
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- § 253. Appointment of Ancillary Receivers of Railways.
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- § 281. Claims Accruing before Receivership Which Are Preferred over Mortgage Claims.
- § 282. Dismissal of Conductor of Railroad by Receiver.

§ 248. No Receivers of Railways in England Except by Statute.¹ Prior to 1867 receivers were not appointed to operate a railway by the English courts, although courts of equity, in England, did appoint receivers of the rents, tolls, duties, etc., of railroads.² Said Sir H. M. Cairns, L. J., in the railway case of *Gardner v. L. C. & D. Railway Co.*:³ “It is impossible to suppose that the court of chancery can make itself, or its officers without any parliamentary authority, the hand to execute the powers conferred by parliament acting for the public interest and authorizing the construction and maintenance of a railway, and all the more impossible when it is obvious that there can be no real and correlative responsibility for the consequences of any imperfect management.”⁴

This decision was put on two grounds: First, upon the ground that it was not the practice of the court of chancery to appoint a manager with a view to the continuance of a business. Second, that powers had been conferred on the directors of

¹ For English statutes authorizing receiver of railways, see ch. XXXV, vol. II, *infra*.

² *Fripp v. The Chard Railway Co.* (1853), 21 Eng. L. & Eq. 53; *Furness v. The Caterham Ry. Co.* (1858), 25 Beav. 614; *Polls v. Warnick*, etc. (1853), Kay Rep. 146.

³ *Gardner v. L. C. & D. Railway Co.* (1867), L. R. 2 Ch. A. C. 201, at 212; *Lee Smith v. Port Dover & L. A. Ry.* (1885), 12 O. A. C. 288.

⁴ *Gardner v. L. C. & D. Railway Co.* (1867), L. R. 2 Ch. A. C. 201, at 212.

managing the railway for certain purposes. These powers must be executed and these duties discharged by the company. They can not be delegated or transferred.⁵

In 1867 the English Railway Companies' Act was passed, providing for the appointment of a receiver and manager of a railway, and all money received by such receiver or manager shall after due provision for the working expenses of the railway and other proper outgoings in respect of the undertakings, be applied and distributed under the direction of the court, etc.⁶

What the expenses and outgoings are is explained by Chatterton, V. C.,⁷ as follows: "The act plainly intended that expenses, such as common sense will show to have been for the working of the railway and for the outgoings necessary to enable it to do its service to the public efficiently, should be paid in the first place, and all the surplus applied to payment of all the debts of the company, properly so-called, according to their respective rights and privities to be ascertained by the court." Such expenses or outgoings do not include a claim for compensation in damages to a ship loading goods at the company's wharf owing to the defective state of the berth during the receivership.⁸

In the above case an action was brought and a judgment obtained against the railway company and its receiver based on an implied contract to keep the wharf and berth in proper repair. The court did not refuse to allow the claim to be admitted to proof, but simply held it was not entitled to priority as an expense or outgoing, as provided for in the statute.

The Act of 1867 was intended to provide against the physical impossibility of carrying on a railway as a going concern for want of rolling stock and plant which would be the case if

⁵ *In re Manchester, etc.* (1880), C. A. 14 Ch. D. 657.

⁶ English Railway Companies' Act 1867, see ch. XXXV, vol. II, *infra*.

⁷ *In re Navan & Kings Court Ry. Co.* (1885), 17 L. R. Ir. 398, at 405, quoted in *In re Wrexham, etc.* (1900), II Ch. D. 440.

⁸ *In re Wrexham, etc.* (1900), II Ch. D. 437.

the judgment creditors were allowed to come and sign all the rolling stock and plant.⁹

§ 249. Receivers of Railways in United States without Statute.¹⁰ One of the earliest instances in the United States of a court of equity taking jurisdiction of all the property of a railway and directing a sale of the entire property for all concerned was the case of *Macon & Western R. R. Co. v. Parker* (1851).¹¹ In that case there were sundry fieri facias against an insolvent railroad and such creditors threatened to seize and sell the road with its equipment, extending through six different counties. Equity took jurisdiction of the matter, directed a sale of the entire property for the benefit of all concerned, and distributed the funds according to the practice and usage in chancery in a creditor's suit against executors and administrators.

The road was sold according to the decree, but to settle the difficulty as to the sale of the franchise without the consent of the powers granting it, upon application an act was passed by the legislature creating the purchaser and his associates a body corporate with the powers and privileges of the old company.

A case followed in the United States Supreme Court,¹² in 1858, wherein the court appointed a receiver to take possession of a bridge and take the tolls.

In 1868 the Supreme Court of Virginia¹³ referred to the English case of *Gardner v. The London, Chatham & Dover Railway*,¹⁴ but nevertheless held that although a court of chancery will be reluctant to appoint a receiver to take charge of and manage a railroad, it is competent to do so when such

⁹ *Wrexam, Mold & Connah* (1900), II Ch. D. 436, at 441.

¹⁰ United States federal statutes governing receivers of railways, see ch. XXXV, vol. II, *infra*.

¹¹ *Macon & Western Ry. v. Parker* (1851), 9 Ga. 378.

¹² See comment in *Covington Draw B. Co. v. Shephard* (1858), 21 How. 112, at 125, 16 L. ed. 38.

¹³ *Stevens v. Davison* (1868), 18 Gratt. (Va.) 819.

¹⁴ *Gardner v. L. C. & D. Ry. Co.* (1867), L. R. 2 Ch. A. C. 201.

a course is indispensable to secure rights of legitimate stockholders and to prevent a failure of justice.¹⁵

In 1875 the Supreme Court of Alabama¹⁶ said: "When courts of equity interfere with the management of a railroad by appointing a receiver and manager, they put forth a power merely incidental and subsidiary to their function of ascertaining and enforcing the rights of the persons concerned in the subject-matter in controversy. They take and preserve the property in order to uphold and maintain the rights of creditors and others therein, and the obligations of contracts. It is in the exercise of the judicial function only that a court obtains jurisdiction between litigant parties of the cause in which it is authorized to take such control for the preservation of the property involved."

The first United States Supreme Court case which flatly holds that a court of equity has power to appoint a receiver to take charge of and operate railroads which have fallen into financial embarrassment and "to operate such roads until the difficulties have been removed, or such arrangements are made that the roads can be sold with the least sacrifice to the interests of those concerned," is *Davis v. Gray*,¹⁷ decided by Justice Swayne. The ready and able justice does not explain away the difficulties which confronted the English courts when called upon to appoint a receiver under similar circumstances; but Swayne, J., says, "It is not unusual for courts of equity to put them (receivers) in charge of the railroads," etc. Subsequent decisions have followed this and other United States Supreme Court precedents.¹⁸

It is the duty of a receiver appointed by a federal court to take charge of a railroad, to operate it according to the laws of the state in which it is situated, and he is liable to suit in

¹⁵ *Stevens v. Davison* (1868), 18 Gratt. (Va.) 819.

¹⁶ *Meyer v. Johnson* (1875), 53 Ala. 237, at 337.

¹⁷ *Davis v. Gray* (1872), 16 Wall. 203, at 219, 21 L. ed. 447.

¹⁸ *Wallace v. Loomis* (1877), 97 U. S. 146, at 162, 21 L. ed. 895; *United States v. Harris* (1899), 177 U. S. 305, 44 L. ed. 780, 20 S. C. Rep. 609; *Erb v. Morasch* (1900), 177 U. S. 584, 44 L. ed. 897, 20 S. C. Rep. 819.

a state, other than that by which he was appointed, even in a state court, for a disregard of official duty which causes injury to the party suing.¹⁹

§ 250. Appointment of Receiver of Railway by State Court²⁰

—**Lines within State.** In those states where statutes provide for the appointment of a receiver over corporations and railways, and in those states and federal courts which hold they have inherent power to appoint receivers of corporations, even without statute, such an appointment covers the property of the railway corporation within the state.²¹ Ordinarily a railroad receiver, acting under appointment in different states in respect to the same property, may be directed by the court of one state in respect to the management of the railroad under the charge of that court, and if such direction affects portions of the line in other states where he is receiver, the courts of those states, where unity of action is essential to the best interests of all concerned, will refrain from any action interfering with the direction or will aid its execution by an independent order. In such cases, an order of court can not be held void for want of jurisdiction, because the court may rely for its full enforcement upon an application of this rule of comity by the courts of another state.²²

§ 251. Appointment of Receiver of Railway by State Court

—**Lines without State.** “It is elementary that no sovereignty can extend its process beyond its own territorial limits, to subject persons or property to its judicial decisions. Every attempted exertion of authority of this sort beyond its limits is a nullity, incapable of binding such persons or property in

¹⁹ *Erb v. Morasch* (1899), 177 U. S. 584, 44 L. ed. 897, 20 S. C. Rep. 819.

²⁰ State statutes governing receivers of railways, see ch. XXXV.

²¹ *Taylor v. Atlantic & Grt. W.*

R. R. Co. (1878), 37 How. Pr. 29; *Matter of United States Roll. Stock Co.* (1878), 55 How. Pr. 286.

²² *Guarantee, etc., v. Philadelphia, etc.* (1897), 69 Conn. 717, 38 Atl. 792.

any other forum.”²³ “In respect to immovable property, every attempt by any foreign tribunal to found a jurisdiction over it must, from the very nature of the case, be utterly migratory, and its decree must be forever incapable of execution in rem.”

The United States Supreme Court has held, in *Miller v. Davis*,²⁴ that a decree of a court of equity sitting in one state with the trustee of the mortgage before it can direct him to make a deed to the purchaser of property in another state. But says Baker, J.,²⁵ commenting on the decision of the United States in *Miller v. Davis*: “In my judgment, this case does not overturn the well-established doctrine that a court in one state can not pass a decree which shall operate to change the title to or merge a lien before immovable property in another state. The title in that case was transferred by the court compelling the execution of a power of sale and not by force of the decree.”²⁶

§ 252. Appointment of Receiver of Railway by Federal Court—Lines in Several States. If a railway is situated entirely within another circuit it was doubtful if the federal court for one circuit had the power to appoint a receiver for that railway. Says Brewer, J.:²⁷ “It may be that is a question that will have to be determined by the judge of that circuit.”

In 1901 congress passed an act providing for the appointment of a receiver by a circuit judge where property lies in different states, yet in the same judicial circuit.²⁸

²³ *Lynde v. Columbus, etc.* (1893), 57 Fed. 993, at 996, quoting Story on Conflict of Laws, 7 ed., par. 539.

²⁴ *Lynde v. Columbus, etc.* (1893), 57 Fed. 993, at 996, quoting Story on Conflict of Laws, 7 ed., 543.

²⁵ *Muller v. Dows* (1876), 94 U. S. 444, 24 L. ed. 76.

²⁶ *Lynde v. Columbus, etc.* (1893), 57 Fed. 993; see question reviewed;

Texas & Pac. Ry. Co. v. Gay (1894), 86 Tex. 511, 25 S. W. 10.

²⁷ *Mercantile T. Co. v. Missouri* (1888), 36 Fed. 227.

²⁸ Revised Stat., sec. 742, 36 Stat. at L. 1102, United States Compiled Statutes (1916), pars. 1037 and 1038; see also *Horn v. Pere Marquette* (1907), 151 Fed. 626.

§ 253. Appointment of Ancillary Receivers of Railways.

Since one state court has no jurisdiction directly of immovable property or persons in another state, and since railways frequently run into several states, it follows that some provisions must be made in the case of a receivership of the railway company by which the whole road may be placed in the hands of the court or courts, and the management co-ordinated. When a suit is filed in one state and a receiver appointed therein ancillary receivers are frequently appointed in other states.²⁹ It is also true that the person who is appointed in the primary jurisdiction is at the same time frequently appointed ancillary receiver in the different states.³⁰ However, some states, as for example Ohio, have statutes providing that only a resident of Ohio can be appointed receiver of a railway or other corporation. Although one state can not have jurisdiction over property and persons in another state, nevertheless, ordinarily a receiver acting under appointment in different states in respect to the same property may be directed by the court of one state in respect to the management of the railroad under the charge of that court and if such direction affects portions of the line in other states where he is receiver, the courts of those states, where unity of action is essential to the best interests of all concerned, will refrain from any action interfering with the direction or will aid in its execution.³¹

The courtesy and comity between courts of equal and co-ordinate jurisdiction requires that a court of quasi ancillary jurisdiction should, in the matter of the appointment of ancillary receivers of railways, conform under ordinary circumstances to the selection of receivers theretofore made by the court of primary jurisdiction.

Says Lurton, J.:³² "We are not prepared to say that circumstances might not arise which would modify and demand

²⁹ *New York, etc., Ry. v. New York, etc., Ry.* (1893), 58 Fed. 278.

³⁰ *Central Ry. v. Wabash, etc.* (1886), 29 Fed. 620; *Dillon v. Oregon, etc.* (1895), 66 Fed. 628.

³¹ *Guarantee, etc., v. Philadelphia, etc.* (1897), 69 Conn. 717, 38 Atl. 792.

³² *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.* (1893), 58 Fed. 268, at 279.

independent action in the appointment of receivers by each court of independent jurisdiction, and even the removal of receivers once appointed. But the respect due by courts of co-ordinate power and jurisdiction to each other, and especially that due by a court whose jurisdiction in a large part is in some sense ancillary to the court of primary jurisdiction—the court where the rights and equities of all must finally be aggregated and the accounts of the receivership be adjusted, demands that a strong case should be made before independent and divergent orders should be made tending to bring conflict between courts endeavoring to administer the same property in such manner as will best subserve the interest of all interested in it.”³³ Circuit courts of different districts, however, have jurisdiction to hear and determine claims of the citizens of those districts against the insolvent railway and the receivers of it and their determination of those matters will be equally respected by the court sitting in the place of primary administration.³⁴

Yet it has been held when a claimant has no lien against real estate in the hands of an ancillary receiver, but simply has a claim against the funds to be distributed by the primary receivership administration, such claims should be presented to the court appointing the primary receiver, because the business of the corporation since the appointment is conducted under the supervision and control of the court in which the receivers are first appointed.³⁵

When property is situated in the same state, yet without different United States districts, the statutes provide that suit may be brought in either district and one receivership may cover the property in both districts.³⁶

³³ *New York, etc., v. New York, etc.* (1893), 58 Fed. 268; see *American v. Union Pac. R. Co.* (1894), 60 Fed. 966.

³⁴ *American v. Union Pac. Ry. Co.* (1894), 60 Fed. 966.

³⁵ *Jennings v. Philadelphia, etc.*

(1884), 73 Fed. 569; *Clyde v. Richmond, etc.* (1893), 56 Fed. 539.

³⁶ See Rev. Stat., sec. 742, 36 Stat. at L. 1102; see *United States Compiled Statutes* (1916), secs. 1037 and 1038; *Horn v. Pere Marquette* (1907), 151 Fed. 626.

§ 254. Appointment of Receiver of Railway—On Application of Railway Corporation. It is rare that a railway or other corporation plaintiff asks for a receiver of its own property. The effect of a receivership is to take the possession of the property out of the hands of the then holder and place it in the custody of the court. The purpose of the appointment of a receiver is to preserve the property or to realize it. If the plaintiff is already in possession, he can not well claim that the possession is wrongful; yet he may claim he can not properly protect it. If a railway corporation brings an adversary suit against some of its creditors or others, and asserts a right and asks for equitable relief, such corporation has placed itself in a position before the court to ask that the property be preserved to meet the outcome of the suit.³⁷

Courts of equity are not insolvency courts, neither are they bankruptcy courts. Except in the case of infants, lunatics, etc., who can invoke the protection of the court through their next friend or otherwise, by *ex parte* proceedings,³⁸ equitable courts can only act in adversary proceedings and appoint receivers, as ancillary or provisional remedies.³⁹

Yet when a plaintiff railway corporation brings a suit against its lessors, mortgagors, or trustees, asking for a sale of the property, marshaling of liens and distribution, it is hard to see why the court could not appoint a receiver on behalf of the corporation plaintiff of property which it holds, if such court could appoint a receiver over property held by the defendant. Such a receiver was appointed in Quincy, etc., Ry. v. Humphreys.⁴⁰ The supreme court said, in commenting on it, "The action of the court in making the appointment of receivers on the application of the mortgagor can not be successfully challenged upon this appeal."

³⁷ *Brassey v. New York & N. E. Ry.* (1884), 19 Fed. 663.

³⁸ *Ex parte Whitfield* (1742), 2 Atk. 315.

³⁹ *People, ex rel., v. Judge* (1875), 31 Mich. 456; *French v. Gifford* (1870), 30 Iowa, 148.

⁴⁰ *Quincy v. Humphreys* (1891), 145 U. S. 82, 36 L. ed. 632.

A further case is found in our federal courts⁴¹ in which a receiver was appointed on behalf of the corporation railway plaintiff. It is not apparent from the reports what final relief was asked against the defendant, but it is apparent some relief was asked.

We believe that the appointment of a receiver depends upon whether he who asks for it has properly invoked the jurisdiction of the court by properly bringing some adversary suit and asking for some final relief and whether he has made a showing that the property upon which such final relief depends and which is brought within the jurisdiction of the court by the suit, demands protection or realization by a receiver.

Contra, it has been held, however, that a corporation can not apply in its corporate capacity and name to be put into the custody of a receiver.⁴²

§ 255. Appointment of Receiver of Railway—On Application of Stockholder. It may be said generally that stockholders' rights in a railway company are no different than their rights in other companies, although the public may have more claims against a railway company than it has against a private corporation.

Dissatisfaction by a minority of the stockholders of a street railway company with the management of a majority, in the absence of fraud, squandering of assets, embezzlement or some other act of the management tantamount to such, is not sufficient to authorize the court to appoint a receiver at the instance of minority stockholders. Minority stockholders can not have the court operate the road through the instrumentality of a receiver merely because they are dissatisfied with the mode of control promised by the majority.⁴³

However, when a bill by a stockholder charges that the assets of the company, instead of being used for the purposes

⁴¹ *Wabash, St. L. & P. Ry. v. Central Trust Co.* (1884), 22 Fed. 272; also same case (1886), 29 Fed. 618.

⁴² *Kimball v. Goodburn* (1875),

32 Mich. 10; *The State, ex rel., Ross* (1894), 122 Mo. 435, 25 S. W. 947.

⁴³ *Fluker v. City Ry. Co.* (1892), 48 Kan. 577, 30 Pac. 18.

pledged, were being squandered, wasted and embezzled by the officers and agents with the assent and connivance of the directors, and that the company had been rendered thereby utterly insolvent, and that only by prohibiting the officers from further meddling with the concerns of the company and having a receiver appointed could relief be given the stockholders and bondholders, then the court upon proper proof may appoint a receiver.⁴⁴

A court of equity may appoint a receiver of a railway company on behalf of a stockholder when such a course is indispensable to secure the rights of legitimate stockholders as against unlawful and illegal acts of the board of directors. Such was done in a case wherein a stockholder filed a bill asking for an injunction against the directors, for the appointment of a receiver, that a certain lease may be set aside and for an account.⁴⁵

§ 256. Appointment of Receiver of Railway—On Application of Unsecured Creditor. While an unsecured creditor, who has no judgment and who claims no lien can not ordinarily go into a court of equity and ask for a receiver of a railroad or other corporation, yet this objection is waived and stands as if it never existed where the defendant company voluntarily appears, confesses the debt, admits its insolvency and joins in the prayer for a receiver, and such an objection can not be thereafter raised by other creditors who were not parties to the suit as brought, but are subsequently brought in or are permitted to intervene.⁴⁶

A bill filed by a simple contract creditor against a corporation asking for a receiver may be demurrable if it does not show that the demand of the plaintiff or complainant has been reduced to judgment, and the defect is not cured by an admission of record of the existence and amount of the debt.⁴⁷ But

⁴⁴ *Forbes v. Memphis, etc.* (1872), 2 Woods, 323.

⁴⁵ *Stevens v. Davison* (1868), 18 Gratt. (Va.) 819.

⁴⁶ *Horn v. Pere Marquette R. R. Co.* (1907), 151 Fed. 626.

⁴⁷ *Farmers L. & T. Co. v. Centralia, etc.* (1899), 96 Fed. 636.

it does not follow in such a case that the court appointing the receiver was wholly without jurisdiction.

The jurisdiction of the court to appoint a receiver for a railroad and the validity of the proceedings taken thereunder do not depend upon the exercise of an unerring judgment as to the sufficiency of the bill to withstand demurrer. Such a bill may be subject to demurrer, but if in its general character and scope, it is of equitable cognizance, the jurisdiction of the court may not depend upon technical sufficiency or fullness of averment. The failure of the pleader to make such an averment will not invalidate receivers' certificates issued under orders of the court appointing receivers.⁴⁸

§ 257. Application of Receiver of Railway—On Application of Secured Creditor. It is not always necessary to show default in payment of secured indebtedness, nor is it always necessary to file a foreclosure suit to entitle a secured creditor to have a receiver appointed over a railway company's property. Where it appears that there are tax levies and judgment levies and liens upon the railway property, danger of refusal of the trustees for the bondholders to act and enforce the mortgage under their powers to protect the bondholders, when the corporation is without a president, vice-president or treasurer, then at a suit by a bondholder against the trustees asking that they be directed to proceed in the performance of their trust—a receiver may be appointed to preserve the property.⁴⁹

Where a creditor has a special contract and an express lien upon accrued earnings and income of a railway company, he may bring suit to sell the property subject to all superior liens and distribute the proceeds equitably among all entitled thereto. In such a suit the court has jurisdiction to take possession of

⁴⁸ *Farmers L. & T. Co. v. Centra-lia*, etc. (1899), 96 Fed. 636.

⁴⁹ *Ralph v. Circuit Judge* (1894), 100 Mich. 164, 58 N. W. 837. Order of court appointing a receiver re-

viewed by upper court on mandamus proceedings directed to the lower court to restore the order appointing receiver.

the railroad and appoint receivers in advance of an application for foreclosure of a mortgage.⁵⁰

Says Shipman, J.: "I am of the opinion that when a railroad corporation with its well-known obligations to the public has become entirely insolvent and unable to pay its secured debts, unable to pay its floating debt, and unable to pay the sums due its connecting lines, unable to borrow money, and in peril of the breaking up and destruction of its business, and confesses this inability, although no default has yet taken place upon the securities owned by the orator but a default is imminent and manifest, a case has arisen whereupon a bill for an injunction against attacks upon the mortgaged property and a receivership to protect the property of the corporation against peril, a temporary receiver may properly and wisely be appointed."⁵¹

"A United States court in the exercise of its chancery jurisdiction and in the absence of statutory power, on a proper showing by a proper party, on due notice, and in the service of a sound discretion, may appoint a receiver over a railway where the company has made default in the payment of its mortgage indebtedness, or where default is imminent by reason of insolvency, or where the interest upon the mortgage has been long past due, and the property is inadequate to satisfy the mortgage indebtedness, or taxes have not been paid."⁵² Such a suit has been successfully maintained by a bondholder or shareholder, apparently asking only for a receiver as final relief.⁵³

Says Shipman, J., further: "It is true that in general a receivership is ancillary or incidental to the main purpose of the bill, but it does not follow that where a case is presented which demands the relief which can be best given by receivership, such

⁵⁰ *Park v. New York, etc. Ry.* (1895), 70 Fed. 641.

⁵¹ *Brassey v. New York & N. E. R. R. Co.* (1884), 19 Fed. 663, at 669.

⁵² *Cole v. Philadelphia & E. Ry. Co.* (1905), 140 Fed. 944; *Brassey*

v. New York & N. E. R. R., 19 Fed. 663; *Long Dock Company v. Mallery*, 12 N. J. Eq. 431; *Towle v. The American B. L. & I.*, 60 Fed. 131.

⁵³ *Cole v. Philadelphia & E. Ry. Co.* (1905), 140 Fed. 944.

relief must be refused, because the time has not arrived when other substantial relief can be asked for. For example, although as a rule, a mortgagee can not ask relief until his mortgage debt has become due, he can go into a court of equity before that time has arrived and ask for an injunction and a receiver to prevent the subject-matter of his mortgage from being impaired and wasted."⁵⁴

It must be noted in such cases that final relief is generally asked for, namely, prevention of some injury by injunction or other final action. As incidental to this a receiver is appointed. In some cases it does not appear that anything more than a receivership is asked for, but it will be generally found in such cases that some final relief was either actually asked for or could have been asked for and the point was not raised.⁵⁵

Judgment creditors of a railway or railways setting out in their bill the precarious conditions of the property of defendants and the necessity for a receiver in the interest of all creditors to prevent the levy of executions on the railway property may have a receiver under certain conditions.⁵⁶

§ 258. Application for Receiver of Railway—In Foreclosure Proceedings. Some of the facts upon which a receivership is predicated in a foreclosure suit against a railway are insolvency of the railway company and its failure to pay the interest on the bonded indebtedness, mismanagement and rapid deterioration and destruction of the property subject to the mortgage.⁵⁷

That the mortgaged railway property is very inadequate security for the mortgage debt, the railroad being insolvent, that the railroad is not keeping the road and rolling stock in proper repair, that the railway is being operated and the

⁵⁴ *Brassey v. New York & N. E. R. R. Co.* (1884), 19 Fed. 669; *Long Dock Company v. Mallery* (1858), 12 N. J. Eq. 431.

⁵⁵ *Cole v. Philadelphia & E. Ry. Co.* (1905), 140 Fed. 944.

⁵⁶ *Union Trust Co. v. Illinois Md.*

Co. (1885), 117 U. S. 459, 29 L. ed. 963; *Sage v. Memphis, etc., Ry.* (1887), 125 U. S. 375, 31 L. ed. 694.

⁵⁷ *Wallace v. Loomis* (1877), 97 U. S. 146, at 161, 24 L. ed. 895; *Lowenthal v. Georgia Coast & P. R. Co.* (1916), 233 Fed. 1010.

affairs of the railway managed and conducted, in the interest of an improvement company and to the detriment and prejudice of those who hold bonds of the railway company⁵⁸ is a ground for a receiver.

When the mortgage property in the case of a railroad or other property is not of value sufficient to secure the payment of the mortgage debt, or when its sufficiency becomes substantially doubtful,⁵⁹ and the mortgagor is insolvent, accruing interest matured and unpaid, like accruing taxes due and unpaid, takes the character of waste as clearly and distinctly as deterioration by the cutting of timber, suffering dilapidations, etc., the leading illustrations from the earliest time in adjudged cases and with text writers. In such cases courts of equity always have the power to take charge of the property by means of a receiver, and to preserve not only the corpus, but the rents and profits for the satisfaction of the debt.⁶⁰

Says Brewer, J.: "The right to foreclose does not necessarily carry with it the right to a receiver. There are many considerations which bear upon the question. Every case, of course, stands on its own merits. It is difficult to formulate any rule which briefly stated will control in all cases. It should appear that there is some danger to the property; that its protection, its preservation, the interests of the various holders require possession of the court before a receiver should be appointed. It does not go as a matter of course, and yet it is not a matter that a court can refuse simply because it is an annoyance. If looking at the situation of the litigating parties, and of the property, with the prospects of the future, it should appear to the courts that they would be benefited, that their interests would be subserved by the appointment of a receiver, why no court—although a matter resting as it is said in its discretion—could refuse the appointment."⁶¹

⁵⁸ *Farmers L. & T. Co. v. Winona* (1893), 59 Fed. 957.

⁵⁹ *Pullan v. C. & C. R. R. Co.* (1865), 4 Biss. 35, at 50; see 225 Fed. 940, 151 Fed. 626

⁶⁰ *Central Trust Co. v. Chattanooga, etc., Ry.* (1899), 94 Fed. 275, at 281.

⁶¹ *Mercantile Trust Co. v. Missouri, etc., Ry.* (1888), 36 Fed. 221.

§ 259. Foreclosure Proceedings after Receiver Appointed.

It frequently happens that foreclosure proceedings are brought after a receiver has been appointed of such a railway.⁶²

§ 260. Grounds for Appointment of Receiver of Railway.

The remedy of the appointment of a receiver will not be employed to change the management of railroad property, simply because stockholders or creditors are dissatisfied with the present existing management.⁶³ They must show that they have an equitable right and that it will be impaired unless the property available for its satisfaction is protected by the appointment of a receiver.⁶⁴

Receivers can never be appointed of railways unless deemed necessary for the preservation of the property, the preservation or enforcement of rights of persons having claims against it, or to have it applied to some lawful purpose for which it has been or is likely to be diverted if the court does not take possession of it through receivers.⁶⁵

A court of equity will not appoint a receiver of a railroad merely upon a showing that there has been a default in the payment of interest secured by a mortgage of the properties and income of the company, that upon such default the trustees under the mortgage were entitled to immediate possession, that they have demanded possession, and that the same has been refused. All this may give rise to a right of foreclosure, without a right to have a receiver appointed,⁶⁶ or change of possession of the property. The right to have a receiver appointed depends upon the danger of ultimate loss to the bondholders by permitting the property to remain in the possession of the owners, until the final decree and sale of same is to be made.⁶⁷

⁶² Chicago, etc., Ry. v. United States & Mex. T. Co. (1915), 225 Fed. 940, at 942.

⁶³ Union Trust Co. v. Railroad Co. (1877), 4 Dillon, 114; C. S. & C. Ry. v. Sloan (1876), 31 O. S. 1.

⁶⁴ Texas & Pac. Ry. v. Gay (1894), 86 Tex. 571, at 582, 26 S. W. 599.

⁶⁵ Texas & Pac. Ry. v. Gay (1894), 86 Tex. 571, at 582, 26 S. W. 599.

⁶⁶ Mercantile T. Co. v. Missouri R. & T. (1888), 36 Fed. 221.

⁶⁷ Union Trust Co. v. Railroad Co. (1877), 4 Dill. 114.

A combination of facts as follows will justify the appointment of a receiver of a railroad: default in interest, the fact that the rents and profits can only be appropriated to the payment of the bondholders by the appointment of a receiver, the decreasing revenues, the recent construction of parallel roads, the fact that the road passes through an unprofitable territory, the bad physical condition of the road and the conflict between various parties having real and substantial interests.⁶⁸

In a case where the plaintiff bondholders have as security for their large advances to a railroad land grants, and these will lapse and be wholly lost unless work will be done and the lines extended, a receiver may be appointed under the exigencies of the case with power to borrow money to complete the unfinished portions of the road.⁶⁹

Insolvency alone, in the absence of statute, is not a ground for the appointment of a receiver of a corporation, nor of a railway. "In the absence of a statute, a court of equity has no authority to act as a court of insolvency for the liquidation of the affairs of an insolvent railway company."⁷⁰

Says Chancellor Dickerson, of New Jersey, in 1843: "It would be unwise and against public policy to seek an occasion for interference with any corporation, so long as they are striving against adversity with honest purpose, unless the case is hopeless, or the course of action so unfair as to jeopardize the interests of creditors and the public."⁷¹

§ 261. Special Features of Railway Receiverships. A railroad receivership involves a number of features and factors which do not obtain in ordinary receiverships. First, according to the English decisions, courts of equity have no inherent power to appoint a receiver to operate a railway, because the

⁶⁸ *Mercantile T. Co. v. Missouri*, etc. (1888), 36 Fed. 221.

⁶⁹ *Kennedy v. St. Paul & P. R. R. Co.* (1873), 2 Dill. 448.

⁷⁰ *Pond v. Framingham & L. Ry.* (1881), 130 Mass. 195.

⁷¹ *Brundred, et al., v. The Paterson, etc.* (1843), 3 Green (N. J.) 305.

power to operate the railway is given to the railway company by an act of parliament and a court of equity can not, without parliamentary authority, make itself the hands to execute those powers.⁷² The English parliament, after the above decision, passed the Railway Companies Act empowering courts of equity to appoint receivers of railways under the conditions therein laid down.

The majority of the courts in the United States hurled aside the technicalities on which the English courts based the refusal to appoint operating receivers and managers of railways, and held and still hold that equity courts have inherent power to appoint a receiver to operate a railway.⁷³ Second. Most railways not only pass through and have property in different counties of the same state, but more frequently pass through different states and sometimes through different counties. These facts suggest many controversies as to jurisdictional matters. Third. The United States government and most of the states have passed statutes peculiar to railway receiverships. Fourth. A railway is a common carrier and must carry freight and passengers for hire, whether it will or not. Fifth. Railways have the power of eminent domain, which ordinary individuals and corporations do not possess. Sixth. Both the federal government and most of the states have commissions which regulate respectively interstate and intrastate commerce. Seventh. Most states have laws declaring what the maximum charge for carrying passengers shall be. Eighth. Other laws are in the statute books peculiar to railways, covering watering of live stock, accidents to employees and passengers, building of viaducts, grade crossings, whistling, ringing of bells, speed of trains, etc.

All these laws have to be considered by the receiver of a railroad and frequently the courts have to decide what are the duties and liabilities of the receiver in the premises.

§ 262. Receivers of Railways—as Common Carriers. The question as to whether or not a receiver of a railroad is a

⁷² Gardner v. Railway Co. (1867),
L. R. 2 Ch. A.C. 201, at 213.

⁷³ Wall v. Platt (1897), 169
Mass. 398, at 400, 48 N. E. 270.

common carrier, did not arise in England, for the courts of equity there flatly decided that they did not have power to take the management of the railroad out of the hands of the company which was given its powers and responsibility to run the road by the parliament or the state.⁷⁴ However, in the United States, the courts did not allow the objections pointed out by the English courts to stand in their way, and early in our history held that a court of equity could take the management of a road out of the hands of the company and operate it through a receiver. When receivers came to manage and control a line of road and conducted and held themselves out as common carriers over that line they were held by the courts to the duties and responsibilities of common carriers.⁷⁵ Receivers run trains, carry passengers, transfer freight, and conduct in the usual manner those active operations for which the railroad was intended and constructed.⁷⁶ In some jurisdictions it has been held that receivers are amenable in the common-law courts to actions for negligence as carriers.⁷⁷ This point is now covered by statute in most of the states and also by federal statutes.

A receiver of a railroad has rights and duties of a common carrier. He is bound to afford to all railroad companies whose lines connect with his equal facilities for the exchange of traffic. It is his duty to receive from and deliver to other connecting roads both loaded and empty cars.⁷⁸

A receiver running a railroad under an appointment of a court of chancery in another state, who acts as a common carrier and is in that other state held liable as a common carrier

⁷⁴ *Gardner v. Railway* (1867), L. R. 2 Ch. A. C. 201, at 213. In 1867 Parliament passed an enabling act defining the powers and liabilities of railway receivers.

⁷⁵ *Blumenthal v. Brainard* (1866), 38 Vt. 407; *Wall v. Platt* (1897), 169 Mass. 400, 48 N. E. 270; *Central T. Co. v. New York City, etc.*, 110 N. Y. 250, at 257, 18 N. E. 92.

⁷⁶ *Wall v. Platt* (1897), 169 Mass. 400, 48 N. E. 270.

⁷⁷ *Blumenthal v. Brainard* (1866), 38 Vt. 402; *Morse v. Brainard* (1869), 41 Vt. 550; *Cutts v. Brainard* (1870), 42 Vt. 566; *Newell v. Smith* (1875), 49 Vt. 265.

⁷⁸ *Beers v. Wabash, etc., Ry.* (1888), 34 Fed. 247.

and liable as such to actions at law, may be sued as a common carrier in the state of Massachusetts.⁷⁹

If a leased road is outside of the jurisdiction of the appointing court or otherwise outside of the control or jurisdiction, the receiver, when he manages or operates such road, stands as an individual, and is liable for his own negligence, whether he acts personally or through agents, alone, or in company with others. He can not be shielded by a description of his office or a declaration that he is acting in an official capacity.⁸⁰

§ 263. Receivers of Railways—Amenable to Statutes Generally. “Though appointed by a court and acting as its officers, the receivers of a railroad corporation, who are authorized to operate and manage a railroad, stand for the time being in many important respects, in the place of the corporation. They run trains, carry passengers, transfer freight, and conduct in the usual manner those active operations for which the railroad was intended and constructed. They are common carriers by virtue of and under the franchise conferred on the corporation, and as such, so far as the public is concerned, are subject to the same duties and liabilities in very many, if not all respects, to which the corporation is subject, and which are imposed on it by the exercise of the power conferred by the franchise.”⁸¹

“They are not servants or agents of the corporation, but for some purposes, at least, their possession may be said to be in a sense its possession, and they succeed for the time being, by virtue of their appointment and authority, to many of its most important powers, privileges and obligations.”⁸²

⁷⁹ *Paige v. Smith, et al.* (1868), 99 Mass. 395; *Nichols v. Smith* (1874), 115 Mass. 332.

⁸⁰ *Kansas v. Smith* (1880), 80 N. Y. 471; *Lyman v. Central W. Ry.* (1886), 59 Vt. 167, 10 Atl. 346.

⁸¹ *Wall v. Platt* (1897), 169 Mass. 400, 48 N. E. 270; *Central Trust Co. v. New York City, etc.* (1888), 110 N. Y. 250, at 257, 18 N. E. 92.

⁸² *Wall v. Platt* (1897), 169 Mass. 399, 48 N. E. 270.

When remedial statutes are to be construed, they are to be construed liberally. The words "railroad corporation" have been interpreted to include receivers of railroads,⁸³ under a Massachusetts statute covering liability of railroads for fire.⁸⁴

Statutes of Michigan (Compiled Laws 1897, sec. 6235), sec. 10, provides that every railroad corporation shall on due payment of freight legally authorized transport property to and from regular stopping places established therefor under penalty. Held by the Supreme Court of Michigan that this is not a penal statute but is remedial in its effect and judgment for a violation of this statute may be had against a receiver.⁸⁵

The Supreme Court of Kansas held⁸⁶ under the Public Utilities Act of Kansas,⁸⁷ that "The appointment of receivers to carry on the business of a public utility does not withdraw that public utility or its receiver from the control of the laws of the state."

§ 264. Receivers of Railways—Not Amenable to All Penal Statutes. Section 3 of the United States Act of August 13, 1888, ch. 866, 25 Stat. 433, 436, provides that a receiver appointed by the United States courts "shall manage and operate such property according to the requirements of the valid laws of the State," etc., and "may be sued in respect of any act or transaction of his in carrying on the business connected with such property," etc.⁸⁸

However, when congress passed a law⁸⁹ entitled, "An act to prevent cruelty to animals while in transit by railroads or other means of transportation within the United States, such a law was penal in its effect and in a penal statute the word

⁸³ Wall v. Platt (1897), 169 Mass. 399, 48 N. E. 270.

⁸⁴ Wall v. Platt (1897), 169 Mass. 399, 48 N. E. 270.

⁸⁵ Robinson v. Harmon (1908), 117 N. W. 664, 157 Mich. 272.

⁸⁶ The State, ex rel., v. Flannelly (1915), 96 Kan. 372, at 382, 152 Pac. 22.

⁸⁷ Kansas Laws (1911), ch. 238. See Georgia statute construed in Atlantic Coast Line v. Georgia (1917), 234 U. S. 280, 58 L. ed. 1312, 34 S. Ct. Rep. 829.

⁸⁸ Statute discussed in First Nat. Bank v. Ewing (1900), 103 Fed. 168, at 195.

⁸⁹ Act of March 3, 1873, ch. 252, 17 Stat. 584.

'company' was held not to be capable of a strained and artificial construction bringing receivers within such term.⁹⁰

§ 265. Receivers of Railways—Powers of Eminent Domain.

When the court takes possession of property and appoints an equitable receiver, the title to such property does not vest in the receiver, neither does the receivership divest the title, neither does it necessarily and always suspend the powers of a railway company.⁹¹ The corporation may, therefore, exercise the powers so long as it does not interfere with the control of the receiver, or transgress any order of the court appointing him. So a company whose property is in the hands of an equitable receiver may bring condemnation proceedings under certain circumstances.

The power of eminent domain belongs to the state. This power may be granted and is granted to railway companies in most states by statute. Such a statute is not penal and in most cases we think should be liberally construed to include receivers of such corporations. No court of equity without statute has the right of eminent domain.

It has been flatly decided that, "A court of equity having in charge the property of a railroad company is authorized to do any act within the corporate power, the performance of which is necessary to preserve the property of the company for the benefit of the company and its creditors. If, when property comes into the hands of the court, the corporation is engaged in some proper and legitimate undertaking, the completion whereof is essential to the successful maintenance and operation of the road and to the preservation of the property, the court may proceed to complete the undertaking, and if required will transfer to and clothe its receiver with such power and authority as the corporation possessed to institute the appropriate legal proceedings to condemn any real estate

⁹⁰ United States v. Harris (1900), 177 U. S. 305, 44 L. ed. 780, quoted as under penal statute in Robinson v. Harmon (1908), 117 N. W. 664, 157 Mich. 272; Atlantic Coast Line

v. Georgia (1913), 234 U. S. 280, 58 L. ed. 1312, 34 S. Ct. Rep. 829.

⁹¹ Detroit, etc., R. Co. v. Campbell (1905), 140 Mich. 391, 103 N. W. 856.

which ought to be acquired in order to push and make useful and available that which the corporation was engaged in constructing when the court displaced it in the possession of its property.”⁹²

When the property of a railway company is in the hands of a receiver, and a telegraph company or other company have a right by law to institute condemnation proceedings and desire to condemn the railroad property, they should first make application to the receivers or directly to the court appointing the receivers, and ask for leave to proceed against the receivers and to condemn property in their hands.⁹³

§ 266. Receivers of Railways—Amenable to Interstate Commerce Commission. Complaints before the Interstate Commerce Commission do not fall within the reason of the rule requiring consent of the court appointing a receiver to be obtained before bringing suit. The main object of such complaints is the regulation or readjustment of rates alleged to be illegal because unjustly discriminative or unreasonable in themselves, and reparation for injury sustained by reason of such illegality; and the order of the commission for reparation or other relief, if not voluntarily obeyed by the carriers, can only be enforced by suit in the proper court. The commission renders no judgment upon which execution can issue and be levied on property in the hands of a receiver.⁹⁴

Says the Interstate Commerce Commission, in 1896: “Receivers of railroad companies are common carriers subject to the prohibitions and requirements of and to regulations under, the provisions of the act to regulate commerce, and any order entered by us requiring reparation to shippers for acts made unlawful by the statute will doubtless be promptly obeyed by the receivers of said defendants under the directions of the

⁹² *Morrison v. Forman* (1899), 177 Ill. 430, 53 N. E. 73; see contra dicta in *Minnesota W. Ry. v. Minnesota & St. L. Ry.* (1895), 61 Minn. 502, 63 N. W. 1035.

⁹³ *Western Union Tel. Co. v. A. & P. Tel. Co.* (1877), 7 Biss. 371.

⁹⁴ *Board of Trade of Troy v. Alabama, etc.* (1893), 6 I. C. R. 1.

courts from which respectively their authority to act was derived.”⁹⁵

§ 267. Receivers of Railways—Amenable to Federal Liability Laws. The rights of employees and the liabilities of receivers of railways under the United States Railway Employees Acts are particularly provided for under United States Compiled Statutes (1914), sec. 8674 (Act of July 15, 1913, ch. 69), also United States Statutes (1914), (Act May 30, 1908), an act to promote the safety of employees on railways—use of common carriers engaged in interstate commerce of other than safety ash pan prohibited.

§ 268. Receivers of Railways—Amenable to State Liability Laws. The Ohio Act of April 2, 1890, for the protection and relief of railroad employees (Laws of Ohio (1890), p. 149), providing that railroad or railway corporations or companies shall not make certain contracts for exemption from liability to their employees, shall not use defective cars, etc., and that in actions against such companies for personal injuries to employees, the rule as to fellow servants is to a certain extent abrogated, applies to suits brought against a receiver of a railroad company operating the road, even though appointed by a federal court. The management and operation of the federal court receiver must be subject to any rule prescribed by the state imposing upon railway corporations liability for the negligence of employees having superior authority over other employees.⁹⁶

Sievers, J., discussing Iowa Railway Employer Act⁹⁷ said: “While it is true that in a general way the road is in the charge of and under the control of the court, yet it is actually operated by the receiver, so far as daily management of trains is concerned, and by what employees the same shall be run and controlled. The court can not establish rules by

⁹⁵ Independent Ref. Asso. v. Western (1896), 6 I. C. R. 378; see receivers subject to state corporation commission, in United States & Mexico T. Co. v. Kansas City M. & O. Rv. Co. (1917). 240 Fed. 505.

⁹⁶ Piera v. Van Duzen (1897), 78 Fed. 693; also see Act of August 13, 1888, ch. 866 (25 St. 443).

⁹⁷ Iowa Code, secs. 1278, 1307.

which the receiver must be guided in such matters. As to those matters, the control of the receiver is just as absolute and unconditional as if he were the owner of the road. No action can be maintained against the court nor against its receiver. It will be conceded for the purposes of this case unless the court so directs. But the receiver is a person, and as the appointee of the court, is, in fact, operating the road. Usually railways are operated by corporations or their lessees. The statute includes them, and all other persons "owning and operating railways."⁹⁸

Railroad Companies' Liability to Employees Law of Kansas⁹⁹ has been held applicable to receivers of railroads.¹

Railway Employees Act of Minnesota² has been construed to be a police regulation and applies to receivers of railways.³

§ 269. Receivers of Railways—Strikes by Operatives. (a) Punishment of Strikers as for Contempt. One of the prominent reasons why courts are so prompt to punish men who interfere with receivers in the custody and control of the property committed to them by law, is the fact that any one engaged in employment under such receivers can have ample redress by applying to the court with respect thereto. If strikers interfere with the property of a railway company in the hands of a receiver, take possession of, or obstruct the operation of engines or cars in the custody of the receiver, it is the right and duty of the court appointing the receiver to punish such strikers for contempt of court.⁴

If the employees of a receiver of a railway company are dissatisfied with the wages paid by the receiver, they may abandon the employment and may even go so far as to urge other em-

⁹⁸ *Sloan v. The Central Iowa Ry.* (1883), 62 Iowa, 728, 16 N. W. 331.

⁹⁹ General Statutes of Kansas (1889), par. 1251.

¹ *Hornsby v. Eddy* (1893), 56 Fed. 461; also *Rouse v. Hornsby* (1895), 68 Fed. 219; also *Rouse v. Harry*

(1895), 55 Kan. 589, 40 Pac. 1007.

² General Statutes of Minnesota (1894), par. 2701.

³ *Mikkelson v. Truesdale* (1895), 63 Minn. 137, 65 N. W. 260.

⁴ *In re Doolittle* (1885), 23 Fed. 544.

ployees to leave by suggestion, reason and legitimate means, but if they resort to threats or violence or make a request backed by a demonstration of force which amounts to an intimidation and so prevent the operation of the trains, such strikers are guilty of contempt of court and may be punished for their unlawful acts.^b

(b) Injunctions against Strikers. Although interference with receivers of railways or their agents or the property under their management may be contempt of court and punishable as such, nevertheless "punishment for contempt is not compensation for the injury." The pecuniary penalty for contumacy does not go to the owner of the property injured. Such contempt is deemed a public wrong and the fine inures to the government. The injunction goes in prevention of wrong to property and injury to the public welfare; the fine in punishment of contumacy. The authority of a court of equity to issue a writ of injunction to prevent injury to property in the hands of a receiver is not impaired by the fact that, independently of the writ, punishment could be visited upon the wrongdoer for interference with property in the possession of the court. The writ of injunction reaches the inchoate conspiracy to injure and prevents the contemplated wrong. The proceeding in contempt is *ex post facto* punishing for a wrong effected.^c

In the absence of legislation to the contrary, the right of one in the service of a quasi public corporation to withdraw therefrom at such time as he sees fit, and the right of the managers of such a corporation to discharge an employee from service whenever they see fit, must be deemed so far absolute that no court of equity will compel him, against his will, to remain in such service, or actually to perform the personal acts required in such employment, or compel such managers, against their will, to keep particular employees in their service. It is competent for receivers of railways, in the absence of legisla-

^b *United States v. Kane* (1885), 23 Fed. 748; *In re Higgins* (1886), 27 Fed. 443.

^c *Farmers L. & T. Co. v. Northern*, etc. (1894), 60 Fed. 803, at 811.

tion to the contrary, subject to the approval of the court, to adopt a schedule of wages and salaries and say to the employees, "We will pay according to this schedule and if you are not willing to accept such wages, you will be discharged." It is competent for an employee to say, "I will not remain in your service under that schedule, and if it is to be enforced, I will withdraw, leaving you to manage the property as best you may without my assistance." But the employees have no right to combine and conspire among themselves with the object and intent, not simply of quitting the service of the receivers, because of the reduction of wages, but of crippling the property in their hands and embarrassing the operation of the road either by disabling or rendering unfit for use engines, cars and other property in the hands of the management or by interfering with their possession or by actually obstructing their control and management of the property, or by using force, intimidation, threats or other wrongful methods against the receivers or their agents, or against employees remaining in their service or by using like methods to cause employees to quit or prevent or deter others from entering the service in place of those leaving it.⁷

"The government of the United States has committed to it power over interstate commerce and the transmission of the mail. In the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the government (through the executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions; that the jurisdiction of courts to

⁷ *Arthur v. Oakes* (1894), 63 Fed. 610.

interfere in such matters by injunction is one recognized from ancient times and by indubitable authority; that such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law; that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt, that such proceedings are not in execution of the criminal law of the land; that the penalty for a violation of injunction is no substitute for and no defense to a prosecution for any criminal offenses committed in the course of such violation.”⁸

§ 270. Effect of Appointment of Receiver of Railways. The appointment of a receiver of a railroad, unless by statute, does not change the title to the property nor work a dissolution of the corporation.⁹ Although the creature of the court, and acting under its orders, the receiver for most purposes stands in the place of the corporation, exercising its general powers, assisting its rights, controlling its property, carrying out the objects for which it was created, discharging the public duties resting upon it, and representing the interests as well of those who own the railroad as of those who have claims against the corporation or its property.¹⁰

A receiver when operating a railroad displaces the directors or other body who by its charter are authorized to manage its affairs¹¹ and under the direction of the court by which he is appointed has the sole control of its property and effects to use in franchises and is responsible for his conduct in all these things to the court appointing him.¹² He uses the

⁸ From *In re Debs' Petition* (1894), 158 U. S. 564, at 599, 39 L. ed. 1092. The conspiracy of Debs, etc., was against certain railroads, some operated by the companies and others by receivers.

⁹ *Kansas City v. Latham* (1916), 182 S. W. 717.

¹⁰ *Pierce v. Van Dusen* (1897), 78 Fed. 693, at 697.

¹¹ *City of Rochester v. Bronson* (1871), 41 How. Pr. 78.

¹² *Kain v. Smith* (1880), 80 N. Y. 471.

railroad franchise as an officer of the court which is administering the affairs of the company.¹³

An order appointing a receiver of a railway is interlocutory only in most cases. Its function is to lay down a scheme for holding and operating the road pending the suit which generally is a foreclosure suit. No claimant acquires any right to the property or its income by virtue of such an order appointing a receiver which may not be modified by later orders or by provisions of the final decree. No vested rights accrue to any such claimant by the provisions of an interlocutory order appointing a receiver.¹⁴

§ 271. Powers and Duties of Receiver of Railway. When a court of competent jurisdiction appoints a receiver of a railway, that court has full and complete jurisdiction of the receiver and the property under his care. It is the court's duty to require and see that the railroad company performs its duties to the stockholders and creditors but also that it performs its duties to the public, and it has the same power to construe the charter in these respects as it would have in a case properly before it and involving the same question. No other court can by mandamus force and order the receiver to do or not to do something.¹⁵

Courts of equity when they have appointed receivers of railroad property may require them to operate such roads, until the difficulties which forced the roads into the hands of receivers are removed.¹⁶

A state receiver must operate such road according to the laws of the state wherein his appointment was made.¹⁷ A

¹³ *Central Trust Co. v. New York C. & N. R. R. Co.* (1888), 110 N. Y. 250, at 257, 18 N. E. 92.

¹⁴ *Atchison v. Osborn* (1906), 148 Fed. 606, at 610; *Kneeland v. American Loan Co.* (1889), 136 U. S. 89, 34 L. ed. 379; *Louisville, etc., Ry. v. Wilson* (1894), 138 U. S. 501, 34 L. ed. 1023; *Greeg v. Mercantile*

Trust Co. (1901), 109 Fed. 220, 226; *Mather Humane Stock, etc., v. Anderson* (1896), 76 Fed. 164.

¹⁵ *State, ex rel., v. Railroad Co.* (1878), 35 Ohio St. 154.

¹⁶ *Davis v. Gray* (1872), 16 Wall. 203, 21 L. ed. 447.

¹⁷ *Little v. Dusenberry* (1884), 46 N. J. L. 614.

receiver appointed by the federal court must also operate such road according to the laws of the state in which it is situate.¹⁸

While a receiver of a railway is an officer of the court, and subject to the orders and directions of the court, yet his instructions are always general in their character. He is expected to look after the details of the business and to apply to the court from time to time when special instructions seem necessary. The very nature of his relations to the court, and his duties to the creditors, entitle him to the largest degree of discretion possible in the discharge of his duties.¹⁹

Peckham, J.,²⁰ said: "The railroad when in the receiver's hands and operated by him, is operated under and by virtue of the franchise which has been conferred upon the corporation by the state."²¹

"Under the order of court the receiver takes possession of all the property of the railway corporation and proceeds to operate, that is to run its trains, and to do all that was formerly done under the directions of the board of directors. In this way he uses the franchise which has been conferred by the state upon the company, and he uses it as an officer of the court which is administering the affairs of the company, and through the court he acts as the company to the same extent *pro hac vice* as if the board of directors were operating the railroad. It is the franchise that is being used in both cases, only in one case it is used by the company and substantially by it, by means of the board of directors, while in the other case the same franchise is being used and the road is operated under it by an officer of the court."²²

¹⁸ *Erb v. Morasch* (1899), 177 U. S. 584, 44 L. ed. 879; *United States v. Harris* (1899), 177 U. S. 305, 44 L. ed. 780; Act of August 13, 1888, ch. 866, par. 2, 25 St. 433, 436.

¹⁹ *Continental, etc., v. Toledo* (1894), 59 Fed. 514.

²⁰ Judge of New York Supreme Court (1888).

²¹ *Central Trust Co. v. New York & N. R. R. Co.* (1888), 110 N. Y. 250, at 257, 18 N. E. 92.

²² *Central Trust Co. v. New York C. & N. R. R. Co.* (1888), 110 N. Y. 250, at 257, 18 N. E. 92.

An Iowa case is found in which a receiver by a suit of mandamus was ordered to build a grade crossing. This order was made by the judge appointing the receiver. Application was made by the city of Fort Dodge.²³

§ 272. Appointment of Receiver of Leasehold Railway. It is not in the power of receivers of railways under ordinary conditions surrounding such appointment to abrogate or annul a lease of property in their hands as receivers, between a lessee company, and the lessor company. Receivers take possession of leased property by and under order of the court, and not by act of any party or under any assignment.²⁴

A receiver's²⁵ position has been said to be analogous to that of an executor who takes possession and enjoys the occupation of property held under a lease to his testator. He thereby becomes liable for the payment of the rent accruing during his occupation of the premises according to the terms of the lease under which it was acquired.²⁶

A receiver appointed by order of a court of chancery is obliged to take possession of a leasehold estate, if it be included within the order of court, but he does not thereby become the assignee of the term,²⁷ or liable for the rent, but holds the property as the hand of the court and is entitled to a reasonable time to ascertain its value before he can be held to have accepted it as lessee.²⁸

When a receiver is appointed for a railroad which embraces leased lines, he does not necessarily assume responsibility for the covenants of the leases, nor take the place of the lessees,

²³ Fort Dodge v. Railway (1893), 87 Iowa, 396, 54 N. W. 243.

²⁴ New York, etc., v. New York, etc. (1893), 58 Fed. 268, at 280.

²⁵ Martin v. Black (1842), 9 Paige, 641; Woodruff v. Erie Ry. Co. (1883), 93 N. Y. 624.

²⁶ Quincy, etc., Ry. v. Humphreys (1891), 145 U. S. 82, 36 L. ed. 632;

contra, Easton v. Houston, etc. (1899), 38 Fed. 784.

²⁷ Quincy, etc., Ry. v. Humphreys (1891), 145 U. S. 82, 36 L. ed. 632; Park v. New York, etc., Ry. (1893), 57 Fed. 799.

²⁸ Gaither v. Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309; Pennsylvania Steel Co. v. New York City Ry. Co. (1912), 198 Fed. 721, at 728.

but he is entitled to a reasonable time in which to determine whether to adopt or renounce them.²⁹

When receivers of a railway take possession of leased property they do not take the lease by assignment and the effect of taking possession of a leasehold interest belonging to the company in the hands of the receivers is totally unlike that resulting from one who takes a lease by assignment. Receivers take possession by and under order of the court and not by an act of the party or under any assignment. Receivers are not bound to adopt a lease and have the option under the direction of the court to do so, or not.³⁰

We can find a case wherein the court says that under certain conditions a receiver being ordered to adopt a lease he becomes an assignee of the lease.³¹ We do not think this was an accurate statement of the receiver's position. When he adopts the lease his position is more like that of one entering into a new lease with terms similar to the old one than his being an assignee of the old lease.

It is competent for the receiver at any time to negotiate a new lease and also to secure a modification of the terms of the lease with the consent of the various parties interested.³²

Courts may authorize receivers to build a railway and have held that receivers may lease one already built not for the sake of entering into new and independent enterprises but simply for the sake of more successfully carrying on the work in hand.³³

²⁹ *Ames v. Union Pac. Ry.* (1894), 60 Fed. 966; *Quincy, etc., Ry. v. Humphreys* (1891), 145 U. S. 82, at 105, 36 L. ed. 632; *United States Trust Co. v. Wabash Ry.* (1893), 150 U. S. 287, 37 L. ed. 1085; *New York, etc. v. New York, etc.* (1893), 58 Fed. 265.

³⁰ *Fosdick v. Schall* (1878), 99 U. S. 235, at 251, 25 L. ed. 339; *Quincy, etc., Ry. v. Humphreys* (1891), 145 U. S. 96, 36 L. ed. 632; *St. Joseph, etc., v. Humphreys*

(1891), 145 U. S. 105-113, 36 L. ed. 640; *New York, etc., v. New York, etc.* (1893), 58 Fed. 280.

³¹ *Easton v. Houston, etc., Ry.* (1889), 38 Fed. 784; see *Matter of Application of Otis* (1886), 101 N. Y. 585, 5 N. E. 571.

³² *Woodruff v. Erie Ry.* (1883), 93 N. Y. 624.

³³ *Mercantile Trust Co. v. Missouri* (1889), 41 Fed. 8; *Gilbert v. Railway* (1880), 33 Gratt. Va. 586.

§ 273. Liabilities of Receiver of Leasehold Railway. When a receiver is appointed over an extensive railway it generally happens that the railway is connected by lease or contract with other railways. The receiver may be properly ordered to take possession of all the estate, right, title and interest of the railway company in leases, contracts, agreements, etc. And yet unless the various connected or affiliated lines of railway are made parties defendant the court has no jurisdiction over such lines and it follows that it can not appoint a receiver of such lines.

However, if the agreement with the lines calls for operating by the original company the receiver when he receives all the estate, right, title and interest of the original railway company in operating and other contracts and agreements may perform and operate under such contracts, at least, long enough to determine whether he shall adopt or repudiate the leases.

If a receiver operates a leased road and yet is not appointed by the court receiver of that road, what is his status and what are his responsibilities in the matter of contracts broken or torts committed in the management and operation of that road?

The receiver is the manager and when he makes contracts either himself or through his subordinates, can he or the subordinates shift the liability to anyone else? If the court has jurisdiction over that road and appoints a receiver to operate it, then the receiver is liable officially in contract and in tort.³⁴ But it frequently happens that the court has not appointed a receiver of the leased line. The receiver is operating the leased line but is not in fact receiver of the leased line. The creditors of the original road actually in the hands of the receiver may be compelled to contribute in case of liability by reason of contract or tort in operating the original road by the receiver, on the theory that the court is preserving the

³⁴ *McNulta v. Lochridge* (1891), 141 U. S. 327, at 332, 35 L. ed. 796.

property, and also operating the line for the public and the creditors are held to have loaned money or credit to the original company, knowing that in case of a receivership they may have to contribute in such cases. But do such creditors have to contribute when a receiver of their road incurs liabilities when operating another leased road?

For any liability by reason of a breach of the operating or other contract between the road in the hands of a receiver and the leased road the receiver may be liable officially provided such breach occurred while he was holding the property. But when a breach of contract occurs or a tort is committed in the operation of the leased line, the receiver can not be officially liable because he was not officially appointed receiver of that line.

The liability of the receiver when operating the leased road must be determined by the relation of the court and the receiver to the leased road. If the court has jurisdiction over the leased road or power to make a decree operating directly on the leased road, then the receiver's liability for contracts and torts in operating the leased road may be the same as in operating the road over which he was primarily appointed. But if the appointing court from which the receiver derives all the authority and immunity he has, has no jurisdiction over the leased road, then the receiver operating the leased road is responsible individually for his operation and management of the road.³⁵

Says Powers, J., of the Supreme Court of Vermont:³⁶ "The scope of the receiver's duty is purely administrative. He is bound to manage the estate according to the rules of good husbandry—good husbandry as applicable to the character of the estate he holds. If the property happens to be a railroad or other going concern that for public reasons or its own conservation or advantage must be kept in operation, and the

³⁵ *Kain v. Smith* (1880), 80 N. Y. 458.

³⁶ *Lyman v. Central Vermont R. R.* Co. (1886), 59 Vt. 180, 10 Atl. 346.

receiver, with or without the credentials of the court, deems it advisable to have other railroads, or engage in other ventures foreign to the scope of his administrative duty to the estate he holds, and so must have employees, must create extended business relations with third persons, and must expose the person and property of others, strangers to the receivership estate to peril and loss; in short, in addition to the functions conferred by the court, must take on another character, as lessee of carrier, etc., then it is easy to see that in all action had in such other and self-assumed character, he is outside his proper function as receiver, and inside his character as master and manager of a business voluntarily assumed, personally managed, and so far as third persons are affected, to all practical intents experimentally his own. If the sanction of the court is had in advance this impresses no new character upon him or the business he assumes, but merely promises indemnity for the hazards of the venture. So long as he holds the property impounded by the receivership, and administers upon it for the purposes for which he was appointed, so far he is a receiver in the true exercise and spirit of the office, and as such is entitled to absolute immunity and protection. When he takes on another character without the scope of his appointment and outside the tenor of the decree creating the receivership, he necessarily takes upon himself the burdens, liabilities and responsibilities incident to the business he assumes. And these liabilities are enforceable in the common-law courts.³⁷

§ 274. Liability of Railway Receiver Generally. When a business or railroad is being operated by a receiver either he or his subordinates frequently enter into contracts and injuries are frequently suffered by passengers, employees, or third parties by reason of an imperfect or improper management. The United States Supreme Court says: "Actions against the

³⁷ *Lyman v. Central Vermont R. R. Co.* (1886), 59 Vt. 180, 10 Atl. 346.

receiver are in law actions against the receivership, or the fund in the hands of the receiver, and his contracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him are payable only from the funds in his hands." ³⁸

The Supreme Court of the United States has even gone so far as to say, "The contracts he (the receiver) makes or the engagements into which he enters from time to time under the order of the court are in a substantial sense the contracts and engagements of the court." ³⁹

When a receiver operates a railroad he is the manager; he or his subordinates enter into contracts or commit torts. It is impossible to get away from this proposition, although the courts have often tried to do so. When a railway or other large business is run by a receiver, such receiver must act largely through subordinates. It has been argued that the receiver should not jeopardize his individual fortune and in running the business or road assume responsibilities not only for his own acts but for the acts of his agents and servants.

England has passed an act providing for the appointment of a receiver of railways and at the same time providing that "Expenses of the railway and other proper outgoings in respect to the undertaking" shall be paid out from the money received by the receiver or manager. ⁴⁰

Ohio has passed an act as follows: "The earnings of a railroad in the hands of a receiver and all other money which comes into his hands as receiver, shall be applied first to pay costs and expenses of the suit in which he was appointed

³⁸ *McNulta v. Lochridge* (1871), 141 U. S. 327, 332, 35 L. ed. 796, cited and approved, *Texas & P. Ry. Co. v. Cox* (1891), 145 U. S. 601, 36 L. ed. 829.

³⁹ *Atlantic Trust Co. v. Chapman* (1907), 208 U. S. 375, 52 L. ed. 528. Note: We must call the attention of the reader to the fact that the court

in this case only had to decide that the parties at whose instance the receiver was appointed were not responsible for his expenses, so that the above quotation may be said to be obiter.

⁴⁰ *English Railway Companies Act* (1897), sec. 4.

and the expense of operating and managing the road, including materials and supplies procured by him therefor, and liabilities incurred by him in such operation and management. Judgments recovered against a receiver for injuries to persons or property, or for wages of employees or work done or materials furnished while he is operating or managing the roads, shall be a line on the funds in his hands as receiver, but shall affect him only in his trust capacity and not individually.”⁴¹

§ 275. Liability of Railway Receivers—Torts. In the management of a large, active business or a public utility or a railway by a receiver most of the activities must necessarily be accomplished by subordinates of the receiver or receivers. It, therefore, happens that in most cases involving torts committed by the management of a railroad under a receiver, subordinates are the real actors. If a receiver himself is guilty of an act or omission which would have been a cause of action apart from his official capacity and official relation to the injured party then a cause of action may well lie against the receiver personally.⁴²

Says Holmes, J., discussing the theory of the liability of a receiver in tort: “The strongest ground for the plaintiff in holding the receiver personally liable for the torts of his management would be that a receiver is not a corporation sole, and that, therefore, his liability must be personal, even if he is entitled to indemnity out of the funds in his hands, according to the general principle applied to trustees, executors, and the like. But the decisions have gone very far in distinguishing between the receiver’s official and personal liability. The universal practice of the courts, bold as it

⁴¹ Ohio General Code, sec. 9066; 69 Ohio Laws, 31 par. 3; see New Jersey Statutes, Revised Statutes, p. 196, par. 106; reviewed in Little

v. Dusenbury (1884), 46 N. J. L. 636.

⁴² Archambeau v. Platt (1899), 173 Mass. 250, 53 N. E. 816.

may seem in its origin, appears to us to be too well established to be departed from.”⁴³

The universal practice which Justice Holmes refers to is expressed in *McNulta v. Lochridge*, wherein Mr. Justice Brown says: “Actions against the receiver are in law against the receivership or the funds in the hands of the receiver; and his contracts, misfeasances, negligences and liabilities are official, and not personal, and judgments against him as receiver are payable only from the funds in his hands.”⁴⁴

§ 276. Liability of Railway Receiver—Torts or Subordinates.

There has been a great deal of litigation concerning the liabilities of receivers of railways for torts committed in the operation of the railway. Most such torts are committed by subordinates operating the road. If those who really operate the road are really servants and agents of the receiver on the doctrine of respondeat superior, receivers of a railroad should be held liable and were so held in a leading Vermont case.⁴⁵ The court held the receivers liable in their individual capacities for the negligence of their servants in losing goods in transit.

Following the *Blumenthal* case came the Ohio case of *Meara's Admr. v. Holbrook*.⁴⁶ The Ohio court saw the difficulties of the situation and developed the theory of holding the receiver liable in his official capacity to his employees and others for injuries sustained through the negligent discharge of his duties by himself and his employees, when the railroad company if it were operating the road would have been liable. The court in justifying its ruling said: “Where the receiver is not in default himself, there is a hardship in making him personally liable for the negligences of those he employs, not for his own benefit, or profit, but for that of the fund he controls; and on the other hand, those having grievances growing

⁴³ *Archambeau v. Platt* (1889), 173 Mass. 250, 53 N. E. 816.

⁴⁵ *Blumenthal v. Brainard* (1866), 38 Vt. 402.

⁴⁴ *McNulta v. Lochridge* (1891), 141 U. S. 327, 332, 35 L. ed. 796.

⁴⁶ *Meara's Admr. v. Holbrook* (1870), 20 O. S. 148.

out of his official business may be often practically remediless if they are left to the personal responsibility of the receiver only and are not permitted to pursue him in his official capacity and obtain redress from the fund in his hands as receiver.”⁴⁷

The Supreme Court of New York had the same question up concerning the liability of a receiver and assignee in bankruptcy for the death of a passenger where no personal neglect is imputed to the receiver either in the selection of his subordinates or in the performance of any duty.

The New York court said that the position of a receiver in running a railroad as an officer of the court is analogous to the position of public officers performing their duties through the agency and with the assistance of subordinate agents employed by them, whether acting gratuitously or for a compensation, and are not answerable for the neglect or wrongful acts of their subordinates. When acting for a compensation they are regarded as being paid for the services rendered and not for taking the hazard of the acts of those necessarily employed by them.⁴⁸

There is good reason that one employing another in his business should be responsible for his acts. The maxim, *qui facit per alium, facit per se*, is in such case properly applied, and all the legal consequences should follow; but says Allen, J., “I know of no principle upon which a receiver or other officer of a court merely obeying the orders of the court, having no interest in the prosecution of the work and deriving no profit from it, should be answerable except for his own acts and neglects.”⁴⁹ We think that Judge Allen’s exposition of the law is correct, and it will be found he is concurred in by the courts of the United States and the different states.⁵⁰

⁴⁷ *Meara’s Admr. v. Holbrook* (1870), 20 O. S. 148.

⁴⁸ *Cardot v. Barney* (1875), 63 N. Y. 287.

⁴⁹ *Cardot v. Barney* (1875), 63 N. Y. 290.

⁵⁰ *Farmers L. & T. Co. v. Central R. R.* (1880), 7 Fed. 537; *McNulta*

v. Lochridge (1891), 137 Ill. 270, 27 N. E. 452; *McNulta v. Lochridge* (1891), 141 U. S. 327, 35 L. ed. 796; *Erb v. Morasch* (1900), 177 U. S. 584, 44 L. ed. 897; see *Davis v. Duncan* (1884), 19 Fed. 477; *Texas & Pac. v. Cox* (1891), 145 U. S. 593, at 597, 36 L. ed. 829.

The courts of New Jersey do not say that a receiver acts as a quasi trustee when he employes subordinates and is, therefore, not liable for their negligence, but the New Jersey court says: "Such a receiver (of a railroad) is not exempt from liability to answer for injuries inflicted by the wrongdoing or negligence of those he employs in operating the railroad. Yet the liability is not a personal one, but only falls on the receiver as the representative of the property and fund managed by the court and damages recovered by such injuries are to be thus collected. Yet upon such liability no suit can be brought except by leave of the court which appointed the receiver. Such leave, however, can not be denied unless the claim appears manifestly unfounded and vexatious." ⁵¹

§ 277. Liability of Railway Receiver—Contracts. There has been much litigation in the United States concerning the liabilities of ordinary receivers and receivers of railways for contracts made during and by the management of the receivership estate. Who makes such contracts, and who or what funds are responsible for such contracts? In the case of railway receiverships the English statute makes provision for the proper expense and outgoings of the undertakings.

In the United States we have no federal statute fixing the status of a railway receiver or providing for the expenses or outgoings of the receivership. Yet Ohio, New Jersey, and some other states have such statutes which substantially relieve the receiver from personal responsibility for torts or contracts of his receivership.

The courts of the United States have been confronted with the proposition that they can not secure a proper and responsible receiver if they hold him primarily responsible for the torts or contracts of his receivership. They have, therefore, hit upon

⁵¹ *Vanderbilt v. Central R. R. Co.* (1887), 43 N. J. Eq. 684, 12 Atl. 188; *Palys v. Jewett* (1880), 5 Stew.

Eq. (N. J.) 302; *Little v. Dusenberry* (1884), 17 Vr. (N. J.) 614.

the idea that he should be responsible officially.⁵² This means that no person or corporation is responsible at all, but a judgment against the receiver officially may be presented as a claim against the funds in the hands of the receiver.

The statement made by the Superior Court of the United States in *McNulta v. Lochridge* seems to be the law and is as follows: "A receiver's contracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him are payable only from the funds in his hands."⁵³

The statement was made in a case when the court was adjudicating concerning a tort committed by a subordinate of the receiver, who preceded the receiver sued. It might, therefore, be said to be "obiter" as to the matter of contracts of a receiver. When we read, however, the statement in *McNulta v. Lochridge*, we must make the additional statement that it only exempts a receiver from personal liability when he acts within the orders of the court appointing him, and the statutes and laws of the land.

As to what are proper contracts, Mr. Justice Peckham says: "Under the modern methods of foreclosing railroad mortgages it has been the custom to appoint receivers to take charge and conduct the business of the railroad mortgagor during the pendency of the suit. The possession of such receivers frequently lasts for years. It would be in the highest degree disadvantageous to all interested in the railroad company, as well as to the public having occasion to do business with it, if the same power which the company possessed to make special contracts for transportation should not be given to and exercised by the receivers of the company in continuing to run the railroad in substance as a going concern, so far as these kinds of contracts are concerned."⁵⁴

⁵² *McNulta v. Lochridge* (1891), 141 U. S. 327, 35 L. ed. 796; approved, *Texas & Pac. Ry. v. Cox* (1891), 145 U. S. 593, at 601, 36 L. ed. 829.

⁵³ *McNulta v. Lochridge* (1891), 141 U. S. 327, 35 L. ed. 796.

⁵⁴ *Northern Pacific Ry. Co. v. Trading Co.* (1904), 195 U. S. 461, 49 L. Ed. 269.

“A receiver of a railroad appointed with authority to make all contracts that may be necessary in carrying on the business of said railway subject to the supervision of the court” has no authority to make a lease for a term of general offices without authority from the court and to bind his successors and the property therefor for the term, without direction from or sanction of the court.⁵⁵

Says Van Fleet, V. C., of New Jersey (1882): “A receiver may undoubtedly appropriate moneys in his hands belonging to the trust, to such purposes, connected with the trust, as he may think proper, always taking the risk that the court will finally approve his action, but he has no authority to bind the trust by contract without the authority of the court. Until his contracts are approved or ratified by the court, it is at liberty to deal with them as to it shall appear to be just and may either modify them or disregard them entirely.”⁵⁶

Judge Magee, of New Jersey, in discussing the status of a contract made by a railroad receiver admits that he, the receiver, makes the contracts but says that his contracts are *sui generis*, saying: “When a receiver has acquired from the court discretionary powers to operate an insolvent railroad, his position is peculiar and the contracts he makes for that purpose are *sui generis*.”

“The liability of a receiver upon those acts of a receiver when running a railroad which constitutes contracts with third persons is not personal but as a representative of the trust. The enforcement of them or the payment of damages for his nonperformance of them must fall primarily upon the property and the fund in the hands of the court.”⁵⁷

§ 278. Liability of Railway Receivers—Contracts of Subordinates. The United States Supreme Court hold that “con-

⁵⁵ Chicago Deposit Vault Co. v. McNulta (1893), 153 U. S. 554, 38 L. ed. 819.

⁵⁶ Lehigh C. & N. Co. v. Central R. R. Co. (1882), 35 N. J. Eq. 429.

⁵⁷ Vanderbilt v. Central R. R. Co. (1887), 43 N. J. Eq. 636, 12 Atl. 188.

tracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands. A receiver can not be held to a higher responsibility for the contracts of his subordinates than for his own contracts. It must, therefore, be, that he is not responsible for the contracts of his subordinates except in his official capacity.”⁵⁸

A receiver manages a railroad as a paid officer of the court; the railroad is not his own. He has no personal interest in its earnings, therefore, the subordinates he employs are not his agents in the real meaning of the word.

Says the New Jersey Supreme Court: “When damages are sustained by reason of the negligence of a receiver’s employees, without personal fault on his part, in matters necessarily or properly committed to them in the management of the trust property, as for example, in operating railroads, the damages which may arise from the negligence or misconduct of such employees without his participation therein are as between the receivers and the trust estate, to be paid, not by him out of his own money but out of the trust property. If this is the rule as to torts, it must be equally so also in regard to contracts. Where the receiver’s subordinates enter into a contract in the course of their management of the business entrusted by him to them and damages arise from their breach thereof, those damages, as between the receiver and the trust estate, are to be paid out of the latter. Suits for damages in either of the cases named are to be regarded as in the nature of proceedings in rem against the trust estate.”⁵⁹

§ 279. Suits against Railway Receiver by Leave—Without Statute. The usage and rules of equity which prevent a suit being brought against a receiver without leave of the court appointing him apply to railway receiverships,⁶⁰ unless the rule

⁵⁸ McNulta v. Lochridge (1891), 141 U. S. 327, at 332, 35 L. ed. 796.

⁶⁰ Barton v. Barbour (1881), 104 U. S. 126, 26 L. ed. 672.

⁵⁹ Kerr v. Little (1884), 39 N. J. Eq. 83, at 85.

has been changed by statute. Before statutes were passed permitting receivers to be sued without leave of the court appointing them, it was the practice to require the claimant to come into the appointing court by petition and on examination of all proofs taken before its commissioner, and itself determine the questions of law, whether the case is one for damages. If it be, then it will order an issue out of chancery, and impanel a jury to assess damages.⁶¹

§ 280. Suits against Railway Receivers with Statute—Without Leave. By federal statutes: "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of court in which such receiver or manager was appointed, but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice."⁶²

Such a law was intended to subject receivers of railroad companies and other companies, appointed by such courts of the United States, to the valid laws and regulations of the state and of the United States, whose object is to promote the safety, comfort and convenience of the traveling public.⁶³

It is the duty of a receiver appointed by a federal court to take charge of a railroad, to operate such road according to the laws of the state in which it is situated.⁶⁴

Such receiver is liable to suit in a court other than that by which he was appointed, even in a state court for a disregard of official duty, which causes injury to the party suing.⁶⁵

⁶¹ The Atlantic M. & O. R. R. case (1882), 4 Hughes, 157.

⁶² United States Act of August 13, 1888, ch. 866, 25 Stat. 433, 436; Act of March 3, 1911, c. 231, sec. 66, 36 Stat. 1104.

⁶³ United States v. Harris (1899), 177 U. S. 305, at 308, 44 L. ed. 780.

⁶⁴ Erb v. Morasch (1899), 177 U. S. 584, 44 L. ed. 897.

⁶⁵ McNulta v. Lochridge (1891), 141 U. S. 327, 35 L. ed. 796; Texas & Pacific Ry. v. Cox (1896), 145 U. S. 593, 36 L. ed. 829; Erb v. Morasch (1899), 177 U. S. 584, 44 L. ed. 897.

§ 281. Claims Accruing before Receivership Which Are Preferred over Mortgage Claims. "There are certain claims against a mortgaged railroad company accruing before the appointment of a receiver which are entitled to a preference over a prior mortgage debt in payment out of the earnings of the railroad during the receivership and out of the sale of the property." ⁶⁶

It is an indispensable element of every such claim that it is founded upon property furnished or services rendered to the mortgagor which either preserved or enhanced the value of the security of the mortgage debt, and thereby inured to the benefit of the mortgagee.

Claims of this character have been given preference over the mortgage debt by the United States Supreme Court decisions on one of two grounds:

First. On the ground that the mortgage is a lien on the net, and not on the gross income of the railway company, and where that part of the income that is applicable to the payment of current expenses of operation, proper equipment, and necessary improvements have been diverted to pay interest on the mortgage debt, or to otherwise benefit the security and this diversion has left claims for these expenses unpaid, it is the province and duty of the chancellor to restore the diverted fund by taking an equal amount from the earnings of the railway company during the receivership, and applying it to the payment of these claims in preference to the mortgage debt.

Second. On the ground that the payment of the claims is necessary to preserve the mortgaged railroad, and to keep it a going concern.⁶⁷

⁶⁶ St. Louis Trust Co. v. Riley (1895), 70 Fed. 32, at 37; Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339; Burnham v. Bowen, 111 U. S. 776, 28 L. ed. 595; St. Louis Ry. v. Cleveland Ry., 125 U. S. 658, 31 L. ed. 832; Railroad Co. v. Hamilton, 134 U. S. 296; Morgans, etc., v. Texas

C. Ry., 137 U. S. 171, 34 L. ed. 625; Loveland & Hinyan Co. v. Blair (1915), 222 Fed. 207; Central T. Co. v. Cast T. Ry., 80 Fed. 624; Southern Ry. v. Carnegie Co., 176 U. S. 257, 44 L. ed. 458.

⁶⁷ St. Louis Trust Co. v. Riley (1895), 70 Fed. 32, at 37.

§ 282. Dismissal of Conductor of Railroad by Receiver. It has been held that when the owners of a railroad seek the assistance of the courts for its protection, by every fair implication they invoke their action not only to protect the property, but to do justice to every honest employee connected with it, and to prevent, if need be, by peremptory judicial orders, oppression, injustice and wrong, even to the humblest employee. The court will be prompt to protect the employees from wrong and injustice of any character.⁶⁸

⁶⁸ *Farmers Loan & Trust Co. v. Central R. & Banking Co. of Georgia, et al.* (1895), 166 Fed. 333.

CHAPTER XVI

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STOCKHOLDERS' LIABILITIES

§ 283. Collections Generally from Stockholders. The liability of an individual for his debts is unlimited, and in the case of a partnership after the firm assets have been exhausted, the individual partner's liability is also unlimited. One of the main causes of the growth of corporations in England and in the United States is the fact that ordinarily the state when it chartered a corporation provides that the owners thereof, or the stockholders, shall not be liable for the debts of the corporation

in their individual capacities,¹ but the capital stock instead shall be liable.

By the federal statute an additional, or often called double liability is imposed upon the holders of national bank stock, and frequently by the state constitutions² or laws such double liability is imposed upon the holders of the stock of state banks and other banking corporations.³ Formerly in the state of Ohio, and today in Minnesota⁴ (California has proportionate liability), such double liability is imposed upon the holder of stock in all corporations chartered by the state. This so-called double or statutory liability is to be distinguished from the more general so-called single liability of stockholders for any unpaid stock they may hold.

When a corporation is unable to pay its debts and goes into the hands of a receiver, an attempt is frequently made to collect funds from the stockholders. Much litigation on the subject has taken place, both in England and America, and the rules laid down for enforcing both the single and double liability are far from being uniform.

Collections from stockholders may be made in the following cases: First. Cases in which the corporation sues the stockholders on unpaid stock, either by reason of an express or implied contract, or by reason of a constitutional or statutory provision in the law of the state or other sovereignty creating the corporation.⁵

Second. Cases wherein a suit has been brought against the corporation by a judgment creditor or other claimant and an equitable receiver has been appointed.^{5a} In that case the receiver may bring suit to enforce a call or assessment which has already

¹ Wood, et al., v. Dummer (1824), 3 Mason, 308.

² Constitution of Ohio as amended 1912, art. 13, sec. 3.

³ Constitution of Washington, art. 12, sec. 11; Constitution of Nebraska, art. 12, sec. 11.

⁴ Constitution of Minnesota, art. 10, sec. 2; Merchants N. B. v. Min-

nesota Thresher Mfg. Co. (1902), 90 Minn. 144; Bernheimer v. Converse (1906), 206 U. S. 516, at 528, 51 L. ed. 1163; Irvine v. Elliott (1913), 203 Fed. 105.

⁵ Anglo-American Land Co. v. Dyer (1902), 181 Mass. 593, 64 N. E. 416; Howarth v. Lombard (1900), 175 Mass. 570, at 573, 56 N. E. 808.

^{5a} Peck v. Elliott (1897), 79 Fed. 10.

been made on stockholders, or he may apply to the appointing equity court and that court may make the call itself. After the equity court has made the call, it may order the receiver to bring suit against the stockholder.

Third. Cases where a judgment creditor, without special statute, brings a creditor's suit, not to wind up the company, but to secure the payment of the debt out of the unpaid stock subscription. Such a creditor's bill is to obtain payment of a judgment out of the credit or intangible property of the corporation; that is, out of the unpaid stock. A creditor's bill merely subrogates the creditor to the place of the debtor and garnishees the debt due to the indebted corporation.⁶ "After all, a company call is but a step in the process of collection, and a court of equity may pursue its own mode of collection, so that no injustice is done to the debtor."⁷

Fourth. Cases wherein a creditor brings a statutory suit under special statutes directly against the stockholders to collect on the unpaid stock.^{8a}

Fifth. Cases wherein a creditor brings a statutory suit under special statute directly against the stockholder to collect the unpaid stock⁸ or the double liability or both.

Sixth. Cases wherein a corporation has been dissolved and the statutory receiver or liquidator by reason of the power given him by statute sues to collect the unpaid stock as part of the assets of the corporation or by statutory power sues to collect the double liability from stockholders.

§ 284. Stockholders Other than Subscribers Liable. The mere fact that the one who received the stock did not enter into a formal contract with the corporation and was not in that sense a subscriber does not relieve him from payment to creditors when he accepts the stock, whether by gift or by

⁶ See title, "Creditor's Suit in Equity against Stockholders," sec. 298, et seq.

^{8a} *John W. Cooney Co. v. Arlington Hotel Co.* (1917), 101 Atl. 879.

⁷ *Hatch v. Dana* (1879), 101 U. S. 205, 25 L. ed. 885.

⁸ *American Spirits Mfg. Co. v. Eldridge* (1911), 209 Mass. 590, 95 N. E. 942.

purchase from the corporation, with the knowledge that the stock was not paid for.⁹

The acceptance and holding of a certificate of shares in a corporation makes the holders liable to the responsibilities of a shareholder.¹⁰ A promise to take shares of stock imparts a promise to pay for them. The same effect results from an acceptance and holding of a certificate.¹¹

It is held by Mr. Justice Strong in 1875, "that if the law implies a promise by the original holders or subscribers to pay the full value when it may be called, it follows that an assignee of the stock when he has come into privity with the company by having this stock transferred to him on the company's books, is equally liable."¹² Taft, J., goes farther¹³ and says: "In determining whether a stockholder is individually liable for the debts of a corporation, after a transfer of his stock, it is not essential to the validity of such transfer that it should be entered upon the register or that a new certificate of stock should be issued, but it is necessary that the transfer be made in good faith, and with consideration, and not merely to escape the liabilities of the corporation already incurred."

The books of a corporation are received in evidence generally to prove corporate acts of a corporation, such as incorporating, its list of stockholders, its by-laws, the formal proceedings of its board of directors, and its financial condition when its solvency is in question. The books may be introduced not only to show transactions between the corporation and its

⁹ *Camden v. Stuart* (1891), 144 U. S. 104, 36 L. ed. 363; *Richardson v. Green* (1889), 133 U. S. 30, 33 L. ed. 516; *Handley v. Stutz* (1890), 139 U. S. 417, 35 L. ed. 227; *French v. Busch* (1911), 189 Fed. 450; *In re L. M. Alleman* (1909), 172 Fed. 611; *Thompson on Corp.*, 2 ed., sec. 3788.

¹⁰ *Upton v. Tribilcock* (1875), 91 U. S. 45, at 47, 23 L. ed. 203; *Brigham v. Mead* (1865), 10 Allen, 245; *Buffalo, etc., City R. R. Co. v. Douglass* (1856), 14 N. Y. 336; *Seymour v. Sturgis* (1862), 26 N. Y. 134;

John W. Cooney Co. v. Arlington Hotel Co. (1917), 101 Atl. 879; see *v. Heppenheimer* (1905), 69 N. J. Eq. 36, 78, 61 Atl. 843, 860.

¹¹ *Bernheimer v. Converse* (1906), 206 U. S. 517, at 528, 51 L. ed. 1163; *Blackburn v. Irvine* (1913), 205 Fed. 225; *Palmer v. Lawrence* (1849), Sand S. C. (N.Y.) 161; *Brigham v. Mead* (1865), 10 Allen, 245.

¹² *Webster v. Upton* (1875), 91 U. S. 65, at 69, 23 L. ed. 384.

¹³ *Wehrman v. Reakert, et al.* (1871), 1 Cin. Sup. Ct. (Ohio) 230.

members, but also between the corporation or its members and strangers.¹⁴

“The directors of a company are incompetent to release an original subscriber to its capital stock, or to make any arrangement with him by which the company, its creditors, or the state shall lose any of the benefit of his subscription. Every such arrangement is regarded in equity, not merely as ultra vires, but as a fraud upon the other stockholders, upon the public and upon the creditors of the company.”¹⁵ A subscriber may transfer his stock without the consent of the company, and thereby vest in the purchaser his right to the shares, and as between himself and such purchaser cast upon the latter the obligation to pay him such installments as are called upon the stock, but the subscriber can not thereby impart or affect the rights of the company. His liability to the company can not thereby be extinguished.¹⁶

§ 285. Stockholder's Single Liability. Stockholders holding stock which has not been fully paid for may be called upon in certain cases to pay, even without a statute therein providing:

First. By the corporation to pay part or all of the unpaid balance.

Second. By creditors to pay part or all of the unpaid balance.

This liability on the stockholders, in both the above cases, is often called the stockholder's single liability as distinguished from the stockholder's further or additional liability to pay a sum more than the full amount and equal to the full amount, which is often called the double liability.

As we have seen by common law, no liability is imposed upon a stockholder for the obligations of the corporation,¹⁷ but the

¹⁴ *Signa Iron Co. v. Brown* (1902), 171 N. Y. 488, at 496, 64 N. E. 194; *Rudd v. Robinson* (1891), 126 N. Y. 113, at 117, 26 N. E. 1046.

¹⁵ *Burke v. Smith* (1872), 16 Wall. 390, at 395, 21 L. ed. 361.

¹⁶ *Hood v. McNaughton* (1892), 54 N. J. L. 428, 24 Atl. 497.

¹⁷ *Wood v. Dummer* (1824), 3 Mason, 308.

capital stock is substituted for the individual liability to respond to corporation liabilities.¹⁸ If a stockholder has not contributed to the capital stock he may be compelled to do so by creditors, either under the English doctrine of his having entered into a contract, express or implied to do so, or else by the generally accepted American doctrine that the capital stock is a trust fund, and collections may be made from the stockholder to make up that fund, or else under the not generally accepted American doctrine that the subscriber to the capital stock commits a fraud on creditors if he does not pay the full amount for his stock.¹⁹ All these doctrines are gone into at length in this chapter under appropriate headings.

§ 286. Stockholders' Double Liability. Stockholders who have paid the full amount of their stock may be called upon in certain cases by creditors to pay to the extent of the amount of their stock in addition to the full amount. This latter or superadded liability of stockholders to creditors is always a creature of the constitution or statute of the state creating the corporation or both.²⁰ It does not exist at common law²¹ and does not now exist by constitution or statute in most states. This double liability was created by the Constitution of Ohio of 1851 followed by Ohio Legislative Acts—R. S. sec. 3258, now Ohio G. C. sec. 8687 et seq. This double liability clause in the Constitution of Ohio was repealed by a joint resolution of the Ohio legislature April 29, 1902, and ratified by the people of Ohio, November 23, 1903.²² However, Art. 13, sec. 3, of the Ohio Constitution, was again amended, September 3, 1912, and the double liability inserted as to "corporations authorized to receive money on deposit."

¹⁸ *Wood v. Dummer* (1824), 3 Mason, 308.

¹⁹ See *Hospes v. North West* (1892), 48 Minn. 174, at 197, 50 N. W. 1117; *Randall Mfg. Co. v. Sanitas, etc.* (1913), 120 Minn. 273, 139 N. W. 606.

²⁰ Constitution of Ohio, art. 13, sec. 3.

²¹ *Hale v. Hardon* (1889), 95 Fed. 747, at 777.

²² 95 Ohio Law, 961.

Stockholders in such corporations are also liable for the unpaid stock owned by them, and stockholders in other corporations for profit although relieved of the double liability are still liable for the unpaid stock owned by them.²³

The double liability is essentially different from the so-called single liability in this, that the corporation can collect from the stockholder under certain circumstances on the unpaid stock; the corporation can never collect the so-called double liability.²⁴ The corporation can exhaust its right to assess stockholders, to discharge a present indebtedness and continue its business with no other security to its future than its corporate liability.²⁵ But the so-called double liability can be collected and enforced only for and by the creditors except when statutory receivers may collect the same. The double liability is collateral and conditional to the principal obligation which rests on the corporation and is to be resorted to by the creditors only in case of the insolvency of the corporation or where payment can not be enforced against it by the ordinary process.²⁶ The double liability can not be controlled, released, or assigned by the corporation even for the general and equal benefit of its creditors. It runs directly to the creditors and can not be enforced by the corporation but only by the creditors or some one representing them.²⁷

The double liability provided by the statutes of Kentucky against stockholders could not be enforced by the corporation. It was held not to be a corporation asset and not a part of the estate of the corporation and therefore did not pass to the trustee in bankruptcy.²⁸

²³ Constitution of Ohio, art. 13, sec. 3, and Ohio Rev. Stat. sec. 3258, now Gen. Code, sec. 8687.

²⁴ *Hawkins v. Furnace Co.* (1884), 40 Ohio St. 507; *Howarth v. Lombard* (1900), 175 Mass. 570, 56 N. E. 888; *Irvine v. Elliott* (1913), 203 Fed. 104.

²⁵ *Umsted v. Buskirk* (1866), 17 Ohio St. 113, at 117.

²⁶ *Wright v. McCormick* (1866), 17 Ohio St. 86, at 95; *Howarth v. Lombard* (1900), 175 Mass. 570, 56 N. E. 888.

²⁷ *Irvine v. Elliott* (1913), 203 Fed. 104.

²⁸ *Tiger Shoe Mfg. Co. v. Shanklin* (1907), 125 Ky. 724, 102 S. W. 295; *Alsop v. Conway* (1911), 188 Fed. 574.

In the absence of special statutory provisions, the double liability is never an asset of the corporation, and does not, therefore, pass to a nonstatutory receiver nor to a trustee in bankruptcy.²⁹

It may be further said of the double liability as follows: "The double liability of the stockholders of a corporation was created for the benefit of its creditors. While it is not an asset of the corporation, adds nothing to its pecuniary resources and is not available to or enforceable by the corporation itself, it does add to its commercial credit. It is enforceable by its creditors, and persons who contract with and give credit to the corporation may well be presumed to do so on the faith of the liability of its stockholders. It is elementary that persons who voluntarily become stockholders in a corporation thereby agree to the terms of its charter. The law which created the defendant's liability was a part of the same system of laws which permitted him and his fellow stockholders to be a corporation. It is to be read into the charter. The two go together. We can not with one hand grasp the benefit and with the other reject the burden."³⁰

While the double liability of stockholders is by reason of the constitution and statutes of the state creating the corporation nevertheless the liability arises in contract either express or implied and an action to enforce the same is transitory and may be brought in any court of general jurisdiction in a state where personal service can be made upon the stockholders.³¹

§ 287. Stockholders' Liability for Contracts of Corporation.

A corporation is a creature of the state; its power to contract

²⁹ *In re Jassoy Co.*, 178 Fed. 515; *Republic Iron & St. Co. v. Carlton* (1911), 189 Fed. 131.

³⁰ *Pulsifer v. Greene* (1902), 96 Me. 446, and cases cited, 52 Atl. 921.

³¹ *Whitman v. Oxford Nat. B.* (1899), 176 U. S. 559, at 567, 44 L. ed. 587; *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864; *McClain v.*

Rankin (1904), 197 U. S. 154, at 163, 49 L. ed. 702; *Converse v. Ayer* (1908), 197 Mass. 453, 84 N. E. 98; *American Spirits Mfg. Co. v. Eldridge* (1911), 209 Mass. 590, 95 N. E. 942; *Bernheimer v. Converse* (1906), 206 U. S. 516, at 529, 51 L. ed. 1163.

and to act is given to it by the state. The property of a corporation is not subject to the control of individual members of the corporation whether acting separately or jointly.³² At common law the stockholder was not liable for the contracts or acts of the corporation, because he could not and can not bind the corporation, neither can he act for the corporation; the corporation contracts and acts through the officers or agents who are the appointees of the corporation and not the appointees of the individual stockholders.³³

The charter of a corporation which relieves the individual stockholder from direct liability for the contracts or acts of the corporation itself substitutes the capital stock instead of the direct individual liability of the stockholders.³⁴

As to a stockholder's liability, the corporation can collect the unpaid stock or an equity court can collect the same when needed to pay the obligations of the corporation to creditors and it is difficult to see how it makes any difference whether these obligations of the corporations are those of tort or of contract. The liability of the stockholder to pay on unpaid stock is by reason of an express or implied contract.

As to a stockholder's so-called double liability, although he may make an express or implied contract, this contract does not run to the corporation at all but runs to the creditor and this liability does not exist without special constitutional or statutory provisions or both. We must, therefore, look to these constitutional and legislative provisions to find out what this liability is.

Besides the double liability statutes, we have special statutes which may be termed single liable statutes allowing creditors to recover from trustees³⁵ or stockholders³⁶ in particular cases

³² *Humphreys v. McKissock* (1890), 140 U. S. 304, at 312, 35 L. ed. 473.

³³ *Smith v. Hurd, et al.* (1847), 12 Met. (Mass.) 384.

³⁴ *Wood v. Dummer* (1824, Story, J.), 3 Mason, 311.

³⁵ *Chase v. Curtis* (1884), 113 U. S. 452, 28 L. ed. 1138, where the New York, Massachusetts and other statutes are mentioned and construed.

³⁶ *American Spirits Mfg. Co. v. Eldridge* (1911), 209 Mass. 590, 95 N. E. 942.

for contracts of the corporation. When the liability is as it were special and possibly penal, the statutes are differently construed. The word "debts" and "due"³⁷ used in such special³⁸ or double liability statutes must include contractual liability but not always tort liability.³⁹

§ 288. Stockholders' Liability for Torts of Corporation.

The constitution and statutes of some states imposing the liability on stockholders use the word "debts" and in such states damages by reason of a tort committed by the corporation can not be collected from the stockholder, when a penal statute using the word "debts" is to be construed.⁴⁰ But even the word "debts" construed when used in a remedial statute has been construed to be equivalent to "dues owing" or "liabilities incurred" and would, therefore, cover unliquidated claims arising from torts.⁴¹ Some constitutions use the word "dues" as for instance, the Ohio Constitution which was, until amended, as follows: "Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law, but in all cases each stockholder shall be liable over and above the stock by him or her owned and any amount unpaid thereon, to a further sum, at least equal in amount to such stock."⁴²

Spear, C. J., of the Ohio Supreme Court, said in *Rider v. Fritchey*,⁴³ "That the word 'dues' should receive a beneficial construction, one which will include within its scope as well a demand for unliquidated damages for a tort, as a claim for a debt arising upon contract."

Since *Rider v. Fritchey* was decided in 1892, the Ohio Constitution has been changed,⁴⁴ and in ordinary cases "dues from

³⁷ Constitution of Ohio, art. 13, sec. 3.

³⁸ *Carver v. Braintree* (1843), 2 Story, 432, 448.

³⁹ See *Chase v. Curtis* (1884), 113 U. S. 452, 28 L. ed. 1138, and cases thereunder.

⁴⁰ *Chase v. Curtis* (1884), 113 U. S. 452, 28 L. ed. 1138.

⁴¹ *Carver v. The Braintree, etc.* (1843), 2 Story, 432, 448.

⁴² Constitution of Ohio, art. 13, sec. 3, as in 1892; see amendment of September 3, 1912.

⁴³ *Rider v. Fritchey* (1892), 49 O. S. 285, at 295, 30 N. E. 692.

⁴⁴ Constitution of Ohio, art. 13, sec. 3, as amended September 2, 1912.

private corporations shall be secured by such means as may be prescribed by law." Ohio G. C. sec. 8686 now provides that stockholders * * * shall be liable * * * to secure the payment of such debts and liabilities. When we come to the double liability expressed in the Constitution of Ohio, we find the words "contracts, debts and engagements." It may be doubtful whether these three words include "torts."

§ 289. Stockholders Agree Impliedly or Otherwise to Pay Creditors. In a well-considered English case⁴⁵ Jessel, M. R., says, "There is a statement (in the English Law of Corp., 40 & 41 Vic., ch. 26) that the capital shall be applied for the purposes of the business and on the faith of that statement which is sometimes said to be an implied contract with the creditors, people dealing with the company give it credit."

The highest American authorities say that the capital stock and property of a corporation by operation of law are made a constructive trust for creditors and stockholders, at the same time holding, as do the English authorities, that the law implies a promise by the original subscriber of stock who did not pay for it in money or other property to pay for the same when called upon by creditors.⁴⁶ And that there is no substantial difference between the liability for an unpaid balance or a stock subscription, which is an express contract to take stock and pay for it,⁴⁷ and the liability for the unpaid deficiency of assets assumed by the act of becoming a member of the corporation through the purchase of stock from which a contract is implied to perform.⁴⁸ The doctrine of implied contract is directly referred to and approved by the Ohio Supreme Court in the well-known case of *Brown v. Hitchcock*.⁴⁹ White, J., quotes from an early case as follows: "It is virtually and in effect a

⁴⁵ *In re Exchange Banking Co.* (1882), 21 Ch. D. 519, at 533.

⁴⁶ *Handley v. Stutz* (1890), 139 U. S. 417, at 427, 35 L. ed. 227; *Signa Iron Co. v. Brown* (1902), 171 N. Y. 488, at 502, 64 N. E. 194.

⁴⁷ *Stoddard v. Lum* (1899), 159 N. Y. 265, 53 N. E. 1108.

⁴⁸ *Howarth v. Angle* (1900), 162 N. Y. 179 at 187, 56 N. E. 489.

⁴⁹ *Brown v. Hitchcock* (1881), 36 O. S. 667, at 678.

liability upon a contract and the mutual agreement of the parties; not, indeed, in form an express contract but an agreement of equally binding obligation, consequent upon and resulting from the acts and admission or implied assent of the parties.”⁵⁰

Every trust may be said to include a contract and much more, so the law as laid down by *Handley v. Stutz* and further explained by later United States cases may be said to follow pretty closely the English cases as far as holding the implied contract to exist but to go a little further than the English cases when holding that a constructive trust exists.

§ 290. Stockholders Liable to Creditors for Unpaid Stock—English Doctrine. As early as 1857 Vice-Chancellor Kindersley held in a case of the winding up of an incorporated insurance company⁵¹ that each shareholder must be considered as having made a contract that the insured or creditors of the insurance company were entitled to have the funds of the society made up or contributed to by the shareholders to the extent of the unpaid calls on their respective shares.

In 1882 Jessel, M. R., refers⁵² to *Evans v. Coventry* as authority for the doctrine of implied contract and says at length: “The creditor of a company has no debtor but that impalpable thing, the corporation, which has no property except the assets of the business. The creditor, therefore, I may say, gives credit to that capital, gives credit to the company on the faith of the representation that the capital shall be applied only for the purposes of the business, and he has, therefore, a right to say that the corporation shall keep its capital and not return it to the shareholders, though it may be a right which he can not enforce otherwise than by a winding up order.

⁵⁰ *Corning v. McCullough* (1847), 1 Comst. (N. Y.) 47, at 55.

⁵¹ *Evans v. Coventry* (1857), 8 De G., M. & G. 835.

⁵² *In re Exchange Banking Co.*, sometimes called *Flitcroft's case* (1882), 21 Ch. D. 519, at 534; *Flitcroft's case* (1882), Ch. D. 519, at 533.

It follows then that if the directors who were quasi trustees of the company, improperly put away the assets of the shareholders, they are liable to replace them."⁵³

The liability of the shareholder is also called "statutable"⁵⁴ which means that the obligation of the stockholder to pay to the creditor under certain conditions, rests upon him by the written law of the land. The same idea is expressed by Lord Halsbury, L. C., in a House of Lords case in 1892 as follows: "It seems to me that the system thus created by which the shareholder's liability is to be limited by the amount unpaid upon his shares renders it impossible for the company to depart from that requirement and by any expedient to arrange with the shareholders that they shall not be liable for the amount unpaid on the shares, although the amount of those shares has been in accordance with the act of Parliament fixed at a certain sum of money. It is manifest that if the company could do so the provision in question would operate nothing."⁵⁵

§ 291. Stockholder Liable to Creditor for Unpaid Stock—American Trust Doctrine. By the common law a stockholder was not liable for the debts of the corporation in which he held stock;⁵⁶ the corporation was and is today considered an entity separate and apart from the stockholders who have incorporated their business. The charter of the state relieves the stockholder from personal responsibility and substitutes the capital stock instead.⁵⁷ If a stockholder subscribes to capital stock and pays for it in full he is not a debtor of the corporation or under any liability to creditors thereof, except when he may be liable by reason of the purely statutory double

⁵³ In re Exchange Banking Co. (1882), 21 Ch. D. 519, at 533.

⁵⁴ Lord Chancellor Chelmsford, *Oakes v. Turquand* (1867), 2 E. & Ir. App. Cases 1867, p. 325, at 350.

⁵⁵ Lord Halsbury, L. C., House of Lords, *Roper v. Gold M. C.* (1892), App. Case, 125.

⁵⁶ *Pollard v. Bailey* (1874), 20 Wall. 520, 22 L. ed. 376; *United States v. Knox* (1880), 102 U. S. 422, 26 L. ed. 216.

⁵⁷ *Wood v. Dummer* (1824), 3 Mason, 308, at 311.

liability. If he subscribes and does not pay for his stock, the corporation can force him to pay or forfeit his stock as provided for by the law of the sovereign state which gave the corporation its charter.⁵⁸

A third party dealing with the corporation is presumed to know what the capital stock is and presumably lends the corporation credit on the faith of this capital stock⁵⁹ which the law says takes the place of the liability of the stockholder in his individual capacity. The creditor does not know the stockholder; he deals with the corporation as an entity and there is no privity between him and the stockholder.

In certain cases the corporation may have agreed with the stockholder that he should not be liable on his stock even if he paid nothing for it or a very little. Yet even then with certain exceptions, the creditor can recover against the stockholder. Why? Because the constitution and statutes under which the corporation is created and given its life provides that the creditor can recover.⁶⁰ Therefore, the stockholder when he acquires his stock presumably knows that he is liable to a creditor, and therefore, the constitution and statutes covering the liability are read into the transaction by which the stockholder acquires his stock. The English cases say that the stockholder makes an implied agreement with the creditor to respond to him. The American cases say the same thing and yet go further and promulgate the trust fund doctrine.

Story, J., seems to have been the inventor of it. He says, "The charter of our banks make the capital stock a trust fund for the payment of all the debts of the corporation."⁶¹

⁵⁸ *John P. Cooney Co. v. Arlington Hotel Co.* (1917), 101 Atl. 879; *Hutchins, et al., v. Mining Co.* (1862), 4 Allen, 582; *Anglo-American Land Co. v. Dyer* (1902), 181 Mass. 593, 64 N. E. 416; *Howarth v. Lombard* (1900), 175 Mass. 570, at 573, 56 N. E. 888; see *Ohio Constitution*, art. 13, sec. 3, amended 1912.

⁵⁹ *Roper v. Gold M. Co.* (1892), 1 English App. Cases, 125, at 133.

⁶⁰ *Stoddard v. Lum* (1899), 159 N. Y. 265, 53 N. E. 1108; *Roper v. Gold M. Co.* (1892), 1 English App. Cases, 125, at 133; *Holcombe v. Trenton, etc.*, 80 N. J. Eq. 122, 82 Atl. 618; *John W. Cooney Co. v. Arlington Hotel Co.* (1917), 101 Atl. 879.

⁶¹ *Wood v. Dummer* (1824), 3 Mason, 308; *Brown v. Hitchcock* (1881), 36 O. S. 667, at 678.

It will be noted that both the English doctrine of implied contract and the American doctrine of trust fund go back to the origin of the obligation, namely, the charter and laws of the state. The explanation of the trust fund doctrine is somewhat as follows: A corporation being an entity but having no life can not conceivably hold anything except by the instrumentality of human agents or directors acting for the corporation in the name of the corporation. Being created by the sovereign state it can not conceivably hold anything except by permission of the state and being an inanimate being it can not hold assets or anything else for itself ultimately, but for someone else, and ultimately some human being must have a beneficial interest in such assets. Such assets can only be held ultimately for either stockholders or creditors. Since the law which creates the corporation says who shall be the ultimate beneficiaries of the funds of the corporation it may be logically said that such funds, before they reach the ultimate beneficiary, are held under a constructive trust, with limitations upon it.

A constructive trust generally includes obligations which are often called implied contracts. A constructive trust is probably a broader term than the term "implied contract" and may well define the basis of the beneficial right which accrues to creditors under certain circumstances in the funds of a corporation or in funds collected from stockholders by reason of provisions in the constitution and statutes authorizing such collections. This beneficial right may accrue to parties unknown to the original or other shareholders and even to parties not in being when the stock was originally acquired.

When we eliminate everything else and search for the basis of the obligation of the stockholders to pay the creditor it can only be the obligation imposed by the constitution and statutes of the state. It does not alter this obligation by calling it one thing or another, although the English cases say the capital stock shall be applied under an implied contract, as the law provides,—and the American cases say the capital

stock is a trust fund. Both statements amount to the same thing when we qualify the American doctrine and say the capital stock is held as a special trust created by the constitution and statutes of the state or sovereign.

From the statement of Story, J., that, "the charter of our banks make the capital stock a trust fund for the payment of all the debts of the corporation,"⁶² many attempts have been made by simple creditors and stockholders to assert rights against this fund as if an unqualified relation of trustee and cestui que trust, and all the ordinary and extraordinary rights of a cestui que trust which are known to equity obtained. All such rights do not obtain, because the so-called trust under which a corporation holds its property is governed by the constitution and statutes of the state creating the corporation and the rules of usage of equity peculiar to such a trust and not necessarily applicable to other trusts. It is said to be a constructive trust by operation of law. It is never understood that this is a specific lien or a direct trust. A long line of United States Supreme Court cases follow *Wood v. Dummer* explains it and shows the limitation of the trust created.⁶³

The trust fund doctrine has been firmly established in Ohio⁶⁴ and the right of a corporation after it has become insolvent and ceased to prosecute the objects for which it was created to prefer one creditor to another has been denied.⁶⁵

⁶² *Wood v. Dummer* (1824), 3 Mason, 308.

⁶³ *Wood v. Dummer* (1824), 3 Mason, 308, at 311; *Burke v. Smith* (1872), 16 Wall. 390, 21 L. ed. 361; *New Albany v. Burke* (1870), 11 Wall. 96, 20 L. ed. 155; *Upton v. Tribilcock* (1875), 91 U. S. 45, 23 L. ed. 203; *Sarger v. Upton* (1875), 91 U. S. 56, 23 L. ed. 220; *Webster v. Upton* (1875), 91 U. S. 65, 23 L. ed. 384; *Chubb v. Upton* (1877), 95 U. S. 665, 24 L. ed. 523; *Pullman v. Upton* (1877), 96 U. S. 328, 24 L. ed. 818; *County of Morgan v. Allen* (1880), 103 U. S. 498, 26 L. ed. 498;

Hawkins v. Glenn (1888), 131 U. S. 319, 33 L. ed. 184; *Graham v. Railroad Co.* (1880), 102 U. S. 148, at 161, 26 L. ed. 106; *Richardson v. Green* (1889), 133 U. S. 30, 33 L. ed. 516; *Handley v. Stutz* (1891), 139 U. S. 417, at 437, 35 L. ed. 227; *John W. Cooney Co. v. Arlington Hotel Co.* (1917), 101 Atl. 879; *Cook v. Carpenter*, 212 Pa. 165, 61 Atl. 799, 1 L. R. A. (N.S.) 900, 108 Am. St. Rep. 854, 4 Ann. Cas. 723.

⁶⁴ *Rouse, trustee, v. Bank* (1889), 46 O. S. 493, 22 N. E. 293.

⁶⁵ *Rouse, trustee, v. Bank* (1889), 46 O. S. 493, 22 N. E. 293.

(a) Limitations on Trust Created. After the trust fund theory of capital stock was once announced⁶⁶ and extended to all the assets of a corporation, attempts have been made to push the doctrine beyond what was first intended. After reading the cases carefully it must be admitted the trust referred to by federal and state courts is not in a complete sense a trust but can only be called a trust by analogy or metaphor.⁶⁸ In other words, there are different attributes to different trusts and there are limitations to the trusts created in respect to the capital stock and assets of a corporation.

(b) Corporations Disposing of Assets to Others than Stockholders. It has been held that where a corporation solvent at the time and having no actual interest to defraud, disposes of its lands for an inadequate consideration or by voluntary conveyance, its subsequent creditors can not question the transaction. A careful reading of the case shows that the Supreme Court of the United States looked upon the corporation when solvent as holding its property as an individual,⁶⁹ the corporation being solvent at the time the rights of their creditors were not affected. It must be noted that the above case was brought by creditors. How far the officers of a corporation even when solvent can dispose of the assets of a corporation in violation of the rights or equities of stockholders was not decided.⁶⁷ Much the same kind of a case was presented by the same court in *Wabash St. L. Ry. v. Ham*.⁷⁰

Later on the United States Supreme Court had before it a case wherein a holder of a demand against a railroad corporation attempted to assert a claim of privity against the assets of a second railroad corporation which bought and mortgaged the assets of the first corporation at a time when the said demand was in existence. The court held that the

⁶⁶ *Wood v. Dummer* (1824), 3 Mason, 308.

⁶⁷ See *McDonald v. Williams* (1898), 174 U. S. 397, at 403 and 404, 43 L. ed. 1022.

⁶⁸ *Hollins v. Brierfield* (1893), 150 U. S. 371, at 381, 37 L. ed. 1113,

citing *Pomeroy on Equity Jurisdiction*, par. 1046.

⁶⁹ *Graham v. Railroad Co.* (1880), 102 U. S. 148, 26 L. ed. 106.

⁷⁰ *Wabash Ry. v. Ham* (1884), 114 U. S. 587, 29 L. ed. 235.

assets passing to the second corporation were not affected with a trust and the demand was not a lien on the property passing to the second corporation nor any restriction upon the company's right to use it for any lawful purpose.⁷¹ If the property of the first company was held in trust for the creditors in an unrestricted meaning of the word trust, then such creditor could have followed the trust funds.

The Supreme Court of the United States again explained and restricted the trust created under the capital stock trust fund doctrine and after reviewing the various United States Supreme Court cases, Brewer, J., says: "These cases negative the idea of any direct trust or lien attaching to the property of a corporation in favor of its creditors and at the same time are entirely consistent with those cases in which the assets of a corporation are spoken of as a trust fund using the term in the sense that we have said it was used, namely that 'it is not in a complete sense a trust but can only be called a trust by analogy.' " ⁷²

(c) Corporations when Solvent Paying Dividend Out of Capital. In 1898 the Supreme Court by Peckham, J.,⁷³ again passed on the trust fund theory in a case wherein a bank while solvent had paid a dividend out of capital. The court referred to permitted the receiver to collect this back from the stockholder, saying:

"These cases (citing various United States cases) show there is no well-defined lien of creditors upon the capital stock of a corporation while the latter is a solvent and going concern, so as to permit creditors to question at the time the disposition of the property. The assets of the bank while it is solvent may clearly not be impressed with a trust in favor of the creditors and yet that trust may be created by the very fact

⁷¹ Fogg v. Blair (1889), 133 U. S. 534, 33 L. ed. 721.

⁷² Hollins v. Brierfield (1893), 150 U. S. 371, 37 L. ed. 1113, citing

Pomeroy on Equity Jurisdiction, par. 1046.

⁷³ McDonald v. Williams (1898), 174 U. S. 397, at 403 and 404, 43 L. ed. 1022.

of the insolvency and the trust enforced by a receiver, as the representative of the creditors.'"

§ 292. Stockholders Liable to Creditors for Unpaid Stock—Doctrine of Fraud. Mitchell, J., of Minnesota, is often quoted as an advocate of the so-called fraud theory of recovery on unpaid stock. He says: "People give credit on the faith of the representation that the capital is paid up, and if it is not paid up, it is fraud upon such people giving credit."⁷⁴ In criticism of Judge Mitchell's statement it may be said: since the statutes of Ohio and most other states permit a corporation to begin business when only a part of its capital stock is issued and partly paid for, it is hard to see how such a corporation or the directors or the stockholders thereof can be guilty of fraudulent representations that the full capital is issued and paid for when they incorporate and file statements in accordance with the statutes. This point was passed upon in a well-considered English case decided by Vice Chancellor Kindersley, 1857, wherein he said, "that the statement in a prospectus, as to the capital being 50,000£ was not a representation calculated to induce a belief that all the shares had been taken or the whole capital paid up and that the directors were, therefore, not liable to make good the funds to that amount on the footing of misrepresentation."⁷⁵

In *Graham v. Railroad Co.*,⁷⁶ which case Mitchell, J., in *Hopes v. North West*, cites as against the trust fund theory and helping him to uphold the fraud theory, Mr. Justice Bradley refuses to allow subsequent creditors to set aside on the ground of constructive fraud a conveyance made by the company for an inadequate consideration. The creditors have no such privity with the so-called fraudulent transaction as to

⁷⁴ *Hospes v. North West* (1892), 48 Minn. 174, at 197, 50 N. W. 1117; *Randall Mfg Co. v. Sanitas, etc.* (1913), 120 Minn. 273, 139 N. W. 606.

by Jessel, M. R., in *Fliteroft's case* (1882), 21 Ch. D. 519, at 534.

⁷⁶ *Graham v. Railroad Co.* (1880), 102 U. S. 148, 26 L. ed. 106.

⁷⁵ *Evans v. Coventry* (1857), 8 De G., M. & G. 835, at 840, approved

entitle them to relief. The stockholders owe the creditors nothing and there is no obligation to pay at all until some authorized demand is made upon them.⁷⁷

In *Graham v. Railroad*, the corporation disposed of property to third parties and yet the courts say that this was not fraudulent as to future creditors. On the same reasoning, how can a stockholder, who acquired stock not fully paid for at the time he acquires it and when the corporation is solvent, commit an act of fraud against a subsequent creditor when the corporation becomes insolvent? What privity is there between such stockholders and the creditors? Such a stockholder will have to make good and pay for his unpaid stock, and yet it seems difficult to place his obligation on the ground of fraud committed against some one whom he does not know and who may not be in existence. Whatever just criticism may be hurled against the trust fund theory it seems more difficult to reconcile the fraud theory with recognized principles of law and equity.

The Supreme Court of United States says,⁷⁸ in *Scoville v. Thayer*: "The stock held by the defendant was evidenced by certificates of full-paid shares. It is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it. But the doctrine of this court is that such contract, though binding on the company, is a fraud in law on its creditors which they can set aside; that when their rights intervene and their claims are to be satisfied the stockholders can be required to pay their stock in full."

It must be noted that the supreme court says, "the contract though binding on the company is a fraud on the creditors and could be set aside by them." The court does not say that the stockholders can be required to pay on the ground of fraud. The distinction is obvious.

⁷⁷ *Scoville v. Thayer* (1881), 105 U. S. 143, at 155, 26 L. ed. 968.

⁷⁸ *Scoville v. Thayer* (1881), 105 U. S. 143, at 155, 26 L. ed. 968;

Richardson v. Green (1889), 133 U. S. 30, at 45, 33 L. ed. 516; *Ex parte Daniell* (1857), 1 De G. & J. 372.

An English case decided by the Lord Justice Turner⁷⁹ and quoted by the United States Supreme Court,⁸⁰ with approval of the English court, says the allotment by the directors of a company who are quasi trustees of shares as full paid, when they were not, is a fraud on the existing shareholders, and the stockholders who received such stock were not relieved of calls when the company was wound up. It is not stated, however, that the creditors collected from stockholders on the ground of fraud.

§ 293. No Release from Unpaid Liability without Consideration. The trust fund theory of capital stock is again asserted by the Supreme Court of the United States,⁸¹ in 1870. Strong, J., says: "No doubt the subscribed capital stock of a corporation is a fund held by it in trust for its creditors as is also all its other property, and had the railroad company released, without equivalent consideration, or given it away, its action would have been fraudulent, and might have been set aside by a court of equity."

Again by the supreme court,⁸² in 1872, Strong, J., says: "Accordingly it has been settled by very numerous decisions that the directors of a company are incompetent to release an original subscriber to its capital stock or to make any arrangement with him by which the company, its creditors, or the state, shall lose any of the benefit of his subscription."

In the above cases Strong, J., refers to a release of subscriptions as being fraudulent and subject to being set aside by a court of equity. It must be noted that fraud is the basis upon which certain actions may be set aside, but Strong, J., does not say that after fraudulent transactions are set aside fraud is the basis of the stockholders' liability to creditors.

⁷⁹ Ex parte Daniell (1857), 1 De G. & J. 372.

⁸⁰ Richardson v. Green (1889), 133 U. S. 30, at 46, 33 L. ed. 516.

⁸¹ New Albany v. Burke (1870), 11 Wall. 96, at 106, 20 L. ed. 155.

⁸² Burke v. Smith (1872), 16 Wall. 390, at 395, 21 L. ed. 361.

§ 294. When Stockholders Not Liable for Full Amount. In the United States and state courts where the trust fund doctrine of capital stock and assets of the corporation prevails, there are cases which hold that under certain circumstances a stockholder will not be assessed for the par value of the stock subscribed or held by him. The pioneer in this field of cases is *Clark v. Bever*,⁸³ followed by *Fogg v. Blair*⁸⁴ and *Handley v. Stutz*,⁸⁵ all in 139 U. S. Reports and decided in 1891. These cases recognize the trust fund theory of capital stock and assets of the corporation and yet Mr. Justice Brown, in delivering the opinion in the often quoted case of *Handley v. Stutz* says, on page 430: "It frequently happens that corporations as well as individuals find it necessary to increase their capital in order to raise money to prosecute their business successfully, and one of the most frequent methods resorted to is that of issuing new shares of stock and putting them upon the market for the best price that can be obtained, and so long as the transaction is bona fide, and not a mere cover for 'watering' the stock, and the consideration obtained represents the actual value of such stock, the courts have shown no disposition to disturb it." When we analyze the court's opinion we find that the underlying reason on which it is based is that under the facts before the court, the court considered it inequitable and unfair to allow an assessment against the particular stockholders involved, or, as it was put by Townsend, J., "There is nothing in the complaint which shows that the complainant or any creditors of the company have suffered for the transfer of stock to the defendant."⁸⁶

In England the courts in certain cases have refused to enforce a liability against stockholders who have brought what was called fully paid-up railway stock at a discount.⁸⁷

⁸³ *Clark v. Bever* (1891), 139 U. S. 96, 35 L. ed. 88.

⁸⁴ *Fogg v. Blair* (1891), 139 U. S. 118, 35 L. ed. 104.

⁸⁵ *Handley v. Stutz* (1891), 139 U. S. 417, 35 L. ed. 227.

⁸⁶ *Seaboard Nat. B. v. Slater* (1902), 117 Fed. 1002.

⁸⁷ *Webb v. Shropshire Rail Co.*, Ch. D. (1893), 3 English App. Cas. 307, at 329.

Lindley, J., in 1892, in a case when stock had been issued by a railway company as fully paid, upheld it on the ground that the company issuing it was governed by the Companies' Clauses Consolidation Act of 1845, which permitted such issue of stock: "Holders of stock issued as fully paid up under statutory powers are under no liability to creditors and can have no call made upon them." However, the court, and later on the House of Lords,⁸⁸ held that a company limited by shares formed and registered under the Acts of 1862 and 1867 (which acts are the General Incorporation Acts of England) has no power to issue shares as fully paid up for a money consideration less than their nominal value, and any agreement with the company was ineffectual to absolve the stockholders from being liable to respond to the creditors.

The English Incorporation of Railways Act seems to make provision for such a corporation selling its stock in certain cases at less than par, but does not permit ordinary manufacturing and commercial corporations to do likewise.

Our supreme court, in *Clark v. Bever*,⁸⁹ and the line of cases cited, has followed generally the English decision as applied to English railroad corporations, but without basing their decisions on any American statutes corresponding to the English statutes. Our supreme court has relieved certain stockholders of railway and other corporations because it was inequitable and unfair to hold them.

Since a great deal of wealth in the country is held in corporate stock and since the legitimate corporations and legitimate transactions and financing by corporations are looked upon with favor by our courts, it would seem that laws may well be passed defining carefully what stock may be assessable and what nonassessable, thus protecting the innocent stockholders on the one hand and any creditors on the other hand, who may look to the unpaid stock for payment of their bills.

⁸⁸ *Roper v. Mining Co.*, 1 English App. Cas. (1892), p. 125.

⁸⁹ *Clark v. Bever*. (1891), 139 U. S. 96, 35 L. ed. 88.

The Ohio Supreme Court⁹⁰ has affirmed the doctrine of *Handley v. Stutz* when the controversy was between stockholders who had paid par and those who in good faith and for the purpose of advancing the interests of the corporation and not their own, had contracted for and received stock at less than its par value. The doctrine of *Handley v. Stutz*,⁹¹ which relieves stockholders under certain circumstances, as applied to creditors seeking to enforce payment in full against stockholders, is upheld in an Ohio Circuit Court decision⁹² in 1905 wherein the company became embarrassed and for the purpose of saving its corporate life and prosecuting the ends for which it was organized issued its stock for the best price it could secure.

§ 295. Sale of Stock by Corporation and Liabilities Therefor. Stock is sometimes issued by a corporation in the form of a sale instead of subscription, the usual method by which corporations issue their stock. The discount suffered by the corporation on account of these sales of stock below par is the difference between its par value and the sum realized by the corporation. This difference, unless there are circumstances which take the case out of the general rule, constitutes assets of the corporation and such a potential fund is primarily liable for the corporate debts.⁹³

§ 296. Stockholders' Liability when Subscribing to Increase of Stock. The rule for enforcing stock liability applies to increasing the stock of a corporation when the question arises upon paying a subscription for stock forming a part of such increase. The duty and the necessity of performing the contract of subscription are the same as in the case of an original stockholder.⁹⁴

⁹⁰ *Peter v. The Union Mfg. Co.* (1897), 56 O. S. 181, 46 N. E. 894.

⁹¹ *Handley v. Stutz* (1891), 139 U. S. 417, 35 L. ed. 227.

⁹² *Kinsey v. Mt. Aub. Cable* (1905), 6 Ohio C. C. (N.S.) 305.

⁹³ *Peter v. The Union Mfg. Co.* (1897), 56 O. S. 181, at 197; 46 N. E. 894; *Wright v. McCormack* (1866), 17 O. S. 86; *Wehrman &*

Co. v. Reakert (1871), 1 C. S. C. R. (Ohio) 230.

⁹⁴ *Chubb v. Upton* (1877), 95 U. S. 665, at 667, 24 L. ed. 523. For discussion of stockholder's liability on overissue of stock, see *John W. Cooney Co. v. Arlington Hotel Co.* (1917), 101 Atl. 879; *Loreda, etc., Co. v. Stevenson*, 66 Fed. 633; *Person & Co. v. Lipps*, 219 Pa. 99, 67 Atl. 1198.

§ 297. Bonus Stock Issued or Sold with Bonds. A corporation in order to dispose of its bonds often offers them for sale and agrees to give for a certain amount of money, generally equal to or less than the par value of the bonds, one bond and a certain number of shares of stock. The giving of the stock is generally called a bonus and sometimes a gratuity.

In a New York case,⁹⁵ the defendant purchased certain bonds and received from the company gratuitously twenty-five shares of stock, upon which forty per cent. was not paid but was credited as paid. The court, Andrews, J., held that the defendant did not subscribe to the stock and entered into no contract either express or implied to pay for it, and that even if the transaction was *ultra vires*, it was a mere nullity and that the defendant got nothing as against anyone entitled to question the transaction. This case seems to be contrary to a long line of cases which hold that the stock issued as a bonus with bonds must be paid for, and a court of equity may require it to be paid up.⁹⁶ Innocent purchasers for value would be exempt.^{96a}

A federal case⁹⁷ is found, the syllabus of which states that the constitution of Nebraska "does not impose liability upon a holder of stock which was never subscribed for but was delivered to him as a bonus for making the loan to the corporation without any agreement or expectation that it should be paid for."

A careful reading of this case shows that the corporation was in an embarrassed condition, and "that there is nothing in the complaint which shows that the complainant or any creditors of the company have suffered from the transfer of stock to the defendant." In other words, this case, although bonus stock was given, falls under the category of *Handley v. Stutz* and such cases.

⁹⁵ *Christensen v. Eno* (1887), 106 N. Y. 97.

⁹⁶ *Richardson v. Green* (1889), 133 U. S. 30, at 46, 35 L. ed. 516, 10 S. C. Rep. 280; *Union Lumber Co. v. Traverse City, etc.* (1912), 136 N. W. 463; *Gillet v. Chicago T. & T. Co.* (1907), 230 Ill. 373, 82 N. E. 891; *John W. Cooney Co. v. Arlington*

Hotel Co. (1917), 101 Atl. 879; *Holcombe v. Trenton, etc., Co.* (1912), 80 N. J. Eq. 122, 82 Atl. 618, *affd.*, 82 N. J. Eq. 364, 91 Atl. 1069.

^{96a} *John W. Cooney Co. v. Arlington Hotel Co.* (1917), 101 Atl. 879.

⁹⁷ *Seaboard Nat. B. v. Slater* (1902), 117 Fed. 1002.

§ 298. **Creditor's Bills against Stockholders to Collect Unpaid Stock.** Creditors of an incorporated company who have exhausted their remedy at law can, in order to obtain satisfaction of their judgments, proceed in equity against a stockholder to enforce his liability to the company for the amount remaining due upon his subscription, although no account is taken of the other indebtedness of the company and the other stockholders are not made parties, although by the terms of the subscription the stockholders were to pay for their shares as called for by the company, and the latter had not called for more than thirty per cent. of the subscriptions.

The liability of a subscriber for the capital stock of a company is several and not joint (unless a statute says it is joint). By his subscription each becomes a several debtor to the company as much as if he had given his promissory note for the amount of his subscription. At law certainly, his subscription may be enforced against him without joinder of other subscribers, and in equity his liability does not cease to be several. A creditor's bill merely subrogates the creditor to the place of the debtor and garnishes the debt to the indebted corporation.⁹⁸ The creditor's bill does not change the character of the debt attached or garnished. In such a case where the creditor does not seek to wind up the corporation, it is not obligatory for the creditor to marshal the assets or to adjust the equities between the corporators. In all that he has no interest. If the defendants in such a case have an interest to be protected, they might secure their protection by moving for a receiver or filing a crossbill, obtaining a discovery of the other stockholders, bring them in, and enforce contribution from all who had not paid their subscriptions.⁹⁹

If the debt due the corporation on unpaid stock is a fixed and definite one by express or implied contract and if no statute interferes, then it would seem it could be collected by a creditor's suit, irrespective of the obligations of other

⁹⁸ *Hatch v. Dana* (1879), 101 U. S. 205, at 211, 25 L. ed. 885.

⁹⁹ *Hatch v. Dana* (1879), 101 U. S. 205, at 214, 25 L. ed. 885; *John W. Cooney Co. v. Arlington Hotel Co* (1917), 101 Atl. 879.

stockholders.¹ In a case, however, where a statute intervenes and provides that, "each stockholder is bound for the debts in proportion to his stock,"² or words of similar import, then such a liability is beyond the stock subscription and its extent can be ascertained only when the obligations of the other shareholders are taken into consideration and in that case the only proper mode of proceeding is by bill in equity in which an account of the debts and stock can be taken and a pro rata distribution made.³

In Foreign Jurisdiction. It is a familiar principle of law that statutes do not extend *ex proprio vigore* beyond the boundaries of the state in which they are enacted. If they are merely penal, they can not be enforced in another state. If they furnish merely a local remedy for the invasion of a recognized right, which is protected elsewhere in other ways, they can not be given effect in another jurisdiction.⁴ If, however, there is a substantive right originating in one state then a corresponding liability will follow the person against whom it is sought to be enforced into another state. Such a right, arising under the common law, is enforceable everywhere.⁵ Such a right, under a local statute, will be enforced *ex comitate* in another state unless there is good reason for refusing to enforce it.⁶

Such a right "will be enforced, not because of the existence of the statute, but because it is a right which the plaintiff legitimately acquired, and which still belongs to him. If the statute creating the right is against the policy of the law of the neighboring state, that is a sufficient reason for refusing to enforce the right there. In the neighboring state in such a case, it will not be considered a right. If the enforcement

¹ Hatch v. Dana (1879), 101 U. S. 205, at 213, 25 L. ed. 885.

² Pollard v. Bailey (1874), 20 Wall. 520, at 524, 22 L. ed. 376; Terry v. Tubman (1875), 92 U. S. 156, 23 L. ed. 537.

³ Hatch v. Dana (1879), 101 U. S. 205, at 213, 25 L. ed. 885.

⁴ Richardson v. New York Cent. Railroad (98 Mass. 85, at 89, cited and followed in Howarth v. Lombard (1900), 175 Mass. 570, at 572, 56 N. E. 888.

⁵ McClaine v. Rankin (1904), 197 U. S. 154, at 161, 49 L. ed. 702, 25 S. C. Rep. 410.

⁶ Howarth v. Lombard (1900), 175 Mass. 570, at 573, 56 N. E. 888.

of a statutory right in a neighboring state in the manner proposed will work injustice to its citizens, considerations of comity do not require the recognition of it by the courts of that state. If the right by the terms of the statute creating it is to be enforced by prescribed proceedings within the state, the right is limited by the statute and can only be enforced in accordance with the statute. If it is of the kind that, with a due regard for the interests of the parties, a proper remedy can be given only in the jurisdiction where it is created, it will not be enforced elsewhere. But if there is a substantive right of a kind which is generally recognized, courts through comity ought to regard it and enforce it as well when it arises under a statute of another state as when it arises at common law unless there is some good reason for disregarding it.”⁷

A corporation has no other legal existence and no power to act except such as was given to it by the sovereignty which created it. It carries with it into every state or country where it may undertake to exercise its corporate functions all the legal attributes and powers, and subjects itself and its members to all the duties and liabilities arising out of or imposed by the provisions of law under which it was originally created and established.⁸

An action was maintained in Massachusetts by an English corporation against a Massachusetts stockholder to recover on an assessment on shares not fully paid,⁹ and it was held as follows:

The statutes and the articles of association which were drawn up in accordance with the statute created a binding and valid contract between the company and the defendant stockholder, by which he came bound to pay to it such calls or assessments as the directors might make upon him from time to time in respect to the moneys unpaid in his shares, and

⁷ *Howarth v. Lombard* (1900), 175 Mass. 570, at 572, 56 N. E. 888, cases cited; Delaware receiver is quasi-assignee and can sue anywhere to enforce stock assessments, *John W. Cooney Co. v. Arlington Hotel Co.* (1917), 101 Atl. 879.

⁸ *Hutchens, et al., v. Mining Co.* (1862), 4 Allen, 582.

⁹ *Anglo-American Land Co. v. Dyer* (1902), 181 Mass 596, 64 N. E. 416.

such a contract could be enforced against him in the courts of any state or country where proper service could be obtained upon and jurisdiction acquired over him.¹⁰

§ 299. Creditors' Suits against Stockholders to Collect Double Liability. The double liability against stockholders does not exist except by reason of the statutory law of the United States as applied to national banks and except by reason of the constitution and statutes of the various states which sometimes make the double liability applicable to banking corporations, and formerly made it applicable to all business corporations.

Some states, as for instance Ohio,¹¹ have special statutes pending how a creditor may bring a suit "to charge the directors, trustees, or other superintending officers of a corporation or the stockholders thereof, on account of any liability created by law."¹²

The double liability is included in this. The statutes of Minnesota¹³ also prescribe a method of enforcing¹⁴ the double liability provision of the constitution of that state.¹⁵

While the so-called double liability is for convenience frequently called statutory, because the state which is the creator of the corporation affixes the obligation to the ownership of the stock, it is contractual and springs from an implied premise. There is no substantial difference between the liability for an unpaid balance in a stock subscription, which is an express contract to take stock and pay for it, and the liability for the unpaid deficiency of assets assumed by the act of becoming a member of the corporation, through the purchase of stock from which a contract is implied to perform the statutory conditions upon which stock may be owned.¹⁶

¹⁰ *Anglo-American Land Co. v. Dyer* (1902), 181 Mass. 596, 64 N. E. 416.

¹¹ Ohio Gen. Code, secs. 8690 et seq.; R. S. secs. 3260 et seq.

¹² Ohio Gen. Code, secs. 8690 et seq.; R. S. secs. 3260 et seq.

¹³ *Laws of Minnesota* (1899), ch. 272.

¹⁴ *Converse v. Hamilton* (1911), 224 U. S. 243, at 254, 56 L. ed. 749, 32 S. C. Rep. 415.

¹⁵ Constitution of Minnesota. art. 10, sec. 3.

¹⁶ *Richmond v. Irons* (1886), 121 U. S. 27, at 56, 30 L. ed. 864, 7 S. C. Rep. 788.

The fact that the single liability is a promise of a principal and the double liability of a surety, does not affect the question. The express or single liability promise runs to the corporation and may be enforced by it, while the double liability promise runs to the creditors alone.¹⁷

If the constitution or statutes upon which the double liability of the stockholder are founded has provided a remedy for that liability, such remedy would be exclusive and could not be enforced in any other state than that state creating the liability.¹⁸

If the constitution or statutes of the state creating the corporation creates no right and imposes no obligation disconnected with the prescribed statutory remedy, which is local in its character and not capable of being enforced elsewhere, then there is no right or obligation for the foreign tribunal to enforce.¹⁹

Stockholders are bound by the provisions of the laws of the state wherein the company is incorporated, for such provisions and laws enter into the contract by which the stockholder acquires his shares, he assents to these obligations by receiving his stock and subjects his rights to that extent to the jurisdiction of the court of the creating state and are sufficiently represented by the corporation in the proceedings before the court of the creating state making certain findings and instructing the receiver to bring suit on the stockholders' liability.²⁰

In Foreign Jurisdiction. Mr. Justice Gray of the United States Supreme Court says:²¹ "In all the diversity of opinion in the courts of the different states, upon the question how far a liability imposed upon the stockholders in a corporation by

¹⁷ Howarth v. Angle (1900), 162 N. Y. 187, 56 N. E. 489.

¹⁸ Shipman v. Treadwell (1911), 200 N. Y. 476, 93 N. E. 1104.

¹⁹ Lowry v. Inman (1871), 46 N. Y. 130.

²⁰ Francis v. Hazlett (1906), 192 Mass. 141, 78 N. E. 405.

²¹ Fourth Nat. B. v. Francklyn (1886), 120 U. S. 747, at 758, 30 L. ed. 825, 7 S. C. Rep. 757; Middle-town Bank v. Railway Co. (1904), 197 U. S. 405, 49 L. ed. 803, 25 S. C. Rep. 462; see contra, Randall, etc., v. Sanitas, etc. (1913), 120 Minn. 268, 139 N. W. 606.

the law of the state which creates it can be pursued in a court held beyond the limits of that state, no case has yet been found in which such a liability has been enforced by any court, without a compliance with the conditions applicable to it under the legislative acts and judicial decisions of the state which creates the corporation and imposes the liability. To hold that it could be enforced without such compliance would be to subject stockholders residing out of the state to a greater burden than domestic stockholders."

In an action for the assessment against stockholders of an Ohio corporation of the amounts due from them under their double liability and for the enforcement of such liability, not only must all stockholders be made parties, but further, the proceedings must be prosecuted in Ohio.²² While, however, an assessment made in such action necessarily includes both non-resident and resident stockholders, no valid and binding judgment or decree in personam can be rendered in the domiciliary proceedings against nonresident stockholders not served with process nor voluntarily appearing. A decree in the domiciliary suit in Ohio finally ascertaining the amount necessary to be raised from the stockholders for the satisfaction of the corporate indebtedness through the enforcement of the double liability and assessing against them severally the amount appearing to be due from them respectively under such liability, while it can be enforced by judgments and executions in the domiciliary proceedings against stockholders over whom jurisdiction in personam has been obtained can not authorize or support a final judgment or decree in the domiciliary suit to be enforced by execution or attachment against nonresident stockholders not served with process nor appearing in the domiciliary proceedings.²³

The domiciliary suit, so far as it related to the making of the assessment against nonresident stockholders not actually

²² *Middletown Bank v. Railway Co.* (1904), 197 U. S. 394, 49 L. ed. 803; *Irvine v. Elliott* (1913), 203 Fed. 99.

²³ *Irvine v. Bankhard* (1910), 181 Fed. 206, affirmed (1911), 184 Fed. 986; *Irvine v. Elliott* (1913), 203 Fed. 99.

served with process nor appearing, was in the nature of a proceeding in rem where service by publication is sufficient.²⁴ As in the domiciliary suit nonresident stockholders may be represented by the company, and the decree ordering the assessment, while not binding them as a judgment or decree in personam rendered after personal service of process, may be conclusive upon them as to the amount of the indebtedness or liability of the company, and the necessity of making an assessment upon the stock to the extent and in the amount set forth in such order and decree.²⁵

The Supreme Court of the United States,²⁶ in passing on the provision of the Minnesota Constitution, art. 1, sec. 3, and the statutes therein provided, held that the act following the constitution was intended to make effectual the liability which is incurred by stockholders under the constitution of the state, and it operates equally upon all stockholders at home and abroad and assesses all by a uniform rule. And a receiver to collect the double liability of stockholders of a Minnesota corporation is more than a chancery receiver—he is a quasi assignee,²⁷ and representative of the creditors, and as such is vested with authority to maintain a suit in a foreign jurisdiction.²⁸

The rulings of the United States Supreme Court concerning the Minnesota statutes have been applied to the Ohio statute determining the insolvency of a corporation and the necessity and amount of an assessment against stockholders under the then double liability and appointing a receiver to collect the

²⁴ *Shipman v. Treadwell* (1911), 200 N. Y. 472, 93 N. E. 1104.

²⁵ *Bernheimer v. Converse* (1906), 206 U. S. 516, 51 L. ed. 1163; *Converse v. Hamilton* (1911), 224 U. S. 243, 56 L. ed. 749; *Howarth v. Lombard* (1900), 175 Mass. 570, 56 N. E. 888; *Hancock Nat. B. v. Farnum* (1899), 176 U. S. 640, 44 L. ed. 619; *Francis v. Hazlet* (1906), 192 Mass. 137, 78 N. E. 405; *Goss v. Carter* (1907), 156 Fed. 746; *Hawkins v. Glenn* (1888), 131 U. S. 319, 33 L. ed. 184; *Irvine v. Putnam* (1909), 167 Fed. 174; *Irvine v. Putnam*

(1911), 190 Fed. 321; *Irvine v. Elliott* (1913), 203 Fed. 102.

²⁶ *Bernheimer v. Converse* (1906), 206 U. S. 531, 51 L. ed. 1163.

²⁷ *Howarth v. Angle* (1900), 162 N. Y. 179, 56 N. E. 489; *Shipman v. Treadwell* (1911), 200 N. Y. 472, 93 N. E. 1104.

²⁸ *Converse v. Hamilton* (1911), 224 U. S. 260, 56 L. Ed. 749. Receiver of Delaware corporation a quasi-assignee, *John W. Cooney v. Arlington Hotel Co.* (1917), 101 Atl. 879.

same, and the Ohio special or statutory receiver was allowed to institute an action in the District Court of the Northern District of New York to enforce the alleged liability of the defendant who was then a resident of the state of New York.²⁹ To the same effect are some recent federal decisions.³⁰

Under the Nebraska Constitution,³¹ "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him held to an amount equal to his respective stock or shares so held," etc. The United States federal court held as to the power of a receiver of the corporation appointed by the Circuit Court for the District of Nebraska to liquidate the bank's affairs, and as a part of the procedure to enforce liabilities of stockholders fixed by the constitution as follows:

"These provisions (of the constitution) are self-executing. They require no supplementary legislation. The liability imposed by them is a trust fund for the benefit of all creditors of the corporation. * * * When appointed (the receiver) has the legal title to the trust fund with the power and charged with the duty to collect it for the creditors of the corporation." Such receiver was allowed to bring suit in the United States Circuit Court for the Southern District of Texas against a citizen of Texas and stockholders of the Nebraska trust company.³²

But nonresident stockholders not appearing nor served with process in the domiciliary proceedings would not be precluded from showing, in proceedings elsewhere brought against them to enforce payment of the assessment, that they were not stockholders, or not holders of stock in the amount alleged or that they had claims against the company which at law or in

²⁹ *Nottinger v. Hendricks* (1913), 208 Fed. 824.

³⁰ *Irvine v. Baker* (1915), 225 Fed. 834, at 837; *Irvine v. Putnam*, 167 Fed. 174; *Irvine v. Bankard*, 181 Fed. 206; *Irvine v. Putnam*, 190 Fed. 321; *Irvine v. Elliott*, 203

Fed. 82; *Blackburn v. Irvine*, 255 Fed. 217.

³¹ Nebraska Constitution, art. 11b, par. 9.

³² *Goss v. Carter* (1907), 156 Fed. 746.

equity they were entitled to set off as against the assessment upon their stock, or that they had any other defense or defenses personal to themselves.³³

§ 300. Creditor's Suit to Collect Unpaid Stock One at Law.

The liability of a subscriber or a stockholder for the capital stock is several ³⁴ and not joint unless the constitution or statute of the creating state specially makes it joint. By this subscription each stockholder becomes a several debtor to the company ³⁵ as much so as if he had given his promissory note for the amount of his subscription. A transferee of stock becomes liable in an implied and not an express promise. At law certainly the subscription or the implied promise may be enforced against him without joinder of other subscribers and in equity his liability does not cease to be several.

A creditor's bill merely subrogates the creditor to the place of the debtor and garnishees the debts due to the indebted corporation. It does not change the character of the debt attached or garnisheed. When the only object of the bill is obtaining payment of a judgment against a corporation not out of its credits or intangible property but out of its unpaid stock, there is not the same reason for requiring all the stockholders to be made defendants as when the object of the bill is to wind up the affairs of the corporation. If the defendant stockholder wishes to have the assets of the corporation marshaled or to adjust equities he might move for a receiver or file a cross-bill and obtain a discovery of other stockholders, bring them in and enforce contribution from all who have not paid their stock subscriptions.

The Ohio statutory action to collect an unpaid subscription to the capital stock (chap. 5, div. 7 of tit. 7 R. T.)³⁶ to wind

³³ *Bernheimer v. Converse* (1906), 206 U. S. 516, 51 L. ed. 1163; *Converse v. Hamilton* (1911), 224 U. S. 243, 56 L. ed. 749; *Howarth v. Lombard* (1900), 175 Mass. 570, 56 N. E. 888; *Irvine v. Elliott* (1913), 203 Fed. 102.

³⁴ *Hatch v. Dana* (1879), 101 U.

S. 212, 25 L. ed. 885; *Ogilvie v. Insurance Co.* (1859), 22 How. 577, at 580, 15 L. ed. 490.

³⁵ *Henry v. Vermillion* (1848), 17 Ohio, 189.

³⁶ Ohio Gen. Code, secs. 11938 et seq.; R. S., secs. 5651-5658.

up the affairs of a corporation is a suit at law to recover a money judgment.³⁷

§ 301. Creditors' Suits to Collect Double Liability Are Equitable. There is no substantial difference between the liability for an unpaid balance in a stock subscription which is an express contract to take stock and pay for it, and the liability for the unpaid deficiency of assets assumed by the act of becoming a member of the corporation through the purchase of stock from which a contract is implied to perform the statutory conditions upon which stock may be owned.

The so-called unpaid stock liability is enforceable without constitutional or statutory provisions and the double liability exists wholly by statute.

If the double liability is declared by constitution to be other than several or if the remedy provided makes it necessary to bring in more than one stockholder then a suit in equity must be brought.³⁸

If on the other hand the double liability provision in the constitution and statutes makes this a several liability and if no other statute makes it necessary to join more than one stockholder then the remedy may be at law.

When the double liability is a proportional liability,³⁹ its extent can only be ascertained when the obligations of the other stockholders are taken into consideration. Under such statute the proper mode of proceeding is by bill in equity in which an account of the debts and stock can be taken and a pro rata distribution can be made.⁴⁰

§ 302. Creditors May Follow Corporate Assets. The Supreme Court of the United States in 1853 by Curtis, J., says:

³⁷ *Smith, Rec., v. Johnson* (1898), 57 O. S. 490, 49 N. E. 693; see also *Henry v. Vermillion* (1848), 17 Ohio, 189.

³⁸ *Richmond v. Irons* (1886), 121 U. S. 27, at 56, 30 L. ed. 864.

³⁹ *Wright v. McCormick* (1866), 17 O. S. 86, at 95; *Mason v. Alex-*

ander (1886), 44 O. S. 318, 7 N. E. 435.

⁴⁰ *Pollard v. Bailey* (1874), 20 Wall. 520, 22 L. ed. 376; *Terry v. Tubman* (1875), 92 U. S. 156, 23 L. ed. 537; *Hatch v. Dana* (1879), 101 U. S. 213, 25 L. ed. 885.

“There is no difficulty in a creditor following the property of a corporation into the hands of anyone not a bona fide creditor or purchaser and asserting his lien thereon and obtaining satisfaction of his just debt out of that fund specially set apart for its payment when the debt was contracted and charged with a trust for all the creditors when in the hands of the corporation.”⁴¹ It must be noted that in the above case the plaintiff had obtained a judgment and execution had been returned unsatisfied. The action was brought in the nature of a creditor’s bill and the affairs of the bank were being wound up by a “financial receiver.”

§ 303. Creditors Cognizant of Stock Issued at Less than Par.

Whether we adopt the trust fund theory of capital stock or the theory of implied contract, which is the English theory, or the theory of fraud on the creditors, we get back to the proposition that theoretically the creditor does not primarily look to the individual stockholder but to the capital stock. The law says that the capital stock shall be paid up. If it is not paid up and the stockholders have been relieved of paying it, by agreement with the corporation and the creditor knows this or knows of this agreement, and acquiesces in it, he can not well say that he relied on this unpaid stock as a fund to pay his debts. If the creditor places no reliance on the supposed paid-up capital, he has no reason of complaint by reason of the subsequent recall of such capital.⁴²

In a Maryland case⁴³ after a company had been in existence for some time, it secured an amended charter wherein it was authorized to issue full paid-up stock to subscribers who had only paid fifty per cent. The court held that the creditor who

⁴¹ Curran v. State of Arkansas. (1853), 15 How. 304, at 311, 14 L. ed. 705; Wood v. Drummer (1824), 3 Mason, 308.

⁴² Coit v. Gold Min. Co. (1886), 119 U. S. 343, at 347, 30 L. ed. 420; Utica Fire Alarm v. Watchman Clock Co. (1911), 166 Mich. 618, at 631, 132 N. W. 502; see Marion Trust Co. v. Blish (1908), 170 Ind. 686, 85 N.

E. 344. See discussions under New Jersey law, Easton, etc., Bank v. American Brick, etc., Co. (1905), 70 N. J. Eq. 732, 64 Atl. 917, 8 L. R. A. (N.S.) 271, 10 Ann. Cas. 84, also discussed in John W. Cooney Co. v. Arlington Hotel Co. (1917), 101 Atl. 879.

⁴³ Williams v. Walters (1897), 97 Md. 117, 54 Atl. 767.

became such after the amendment to the charter and with full knowledge thereof could not collect the remaining fifty per cent.

§ 304. Creditors Becoming Such Before Issue of Stock. If only such creditors can take advantage of the fund derived from the collection of unpaid stock as may be presumed to have relied on such a fund, it follows that creditors before such issue did not rely on such a fund and, therefore, can not collect.⁴⁴ Or to put it in a little different way: if a corporation issue new shares after the claim of a creditor arose, it is clear that the latter could not have dealt with the company on the faith of any capital represented by them.⁴⁵ Whatever was contributed as capital in respect to new shares was a clear gain to the creditors' security.

And yet the Ohio statute G. C. sec. 8686 et seq., as amended 1902, says: "The stockholders of a corporation who are holders of its shares at a time when its debts and liabilities are enforceable against them" are liable. The statute may shift the liability from the stockholder who was such when the liability was created to the stockholder who was such when the liability was enforceable, but this statute would not seem to be authority for making the holders of new stock issued after debts were created liable for such debts.

It can not well be that this statute abolishes the theory of a creditor collecting by reason of relying on the paid up stock, and if the fund is not inexistence potentially or otherwise, it is hard to see how he could have relied on it.

§ 305. Credits on Stockholder's Liability. In *Richmond v. Irons* ⁴⁶ it was held that the ordinary costs of a creditor's suit to enforce the double liability against bank stockholders should be charged against such stockholders as defendants in the

⁴⁴ *Coit v. N. C. Gold Mining Co.* (1882), 14 Fed. 12, at 16; also, same case, approved (1886), 119 U. S. 343; *Handley v. Stutz* (1891), 139 U. S. 417, 35 L. ed. 227.

⁴⁵ See *Marion Trust Co. v. Blish* (1908), 170 Ind. 686, 85 N. E. 344.

⁴⁶ *Richmond v. Irons* (1886), 121 U. S. 27, 30 L. ed. 864; contra, *Buist v. Williams* (1908), 81 S. C. 495, at 502, 62 S. E. 859; see *John W. Cooney Co. v. Arlington Hotel Co.* (1917), 101 Atl. 879.

cause, but that stockholders should not be obliged to contribute as a debt due from the bank or from themselves, to a fund for the payment of the expenses of a receivership, because the receiver was not necessary to the enforcement of the liability on the stockholders. That liability was in progress of enforcement by the creditors themselves.

§ 306. Evolution of Law of Stockholders' Liability. The law of corporations and receiverships is going through a very rapid evolution. We all know that most creditors who deal with a corporation do not look to the capital stock as a fund from which they may be paid because in most cases they do not know what the capital stock is. If they did look on the corporation records of the state they would find nothing there to show that some stockholder had subscribed or bought stock in the usual way and were, therefore, liable and others had bought as in *Handley v. Stutz*,^{40a} and could, therefore, not be held liable. Furthermore, the incorporation records of the state do not usually disclose who the stockholders are, and if the names of the stockholders were there, a register of the financial standing of such stockholders would be lacking.

Creditors who really investigate the financial responsibility of a corporation demand a balance sheet and look at the real so-called live or ready available assets. The capital stock unpaid is very seldom put down on a balance sheet.

In a great many cases the holders of the so-called unpaid stock are innocent and ignorant of the transactions which involve them in lawsuits demanding payment on their stock. Looking at the statutes and decisions of today, it would seem possible in the evolution of the law of stock liability that the states would demand certain moneys paid in when a corporation is formed, possibly more than at present, and insist upon the preservation of that fund, but relegate the creditors to that fund and to the directors rather than to the stockholders who in the main are innocent.

^{40a} *Handley v. Stutz* (1891), 139 U. S. 118, 35 L. ed. 227; see sec. 294, *infra*.

RECEIVERS TO COLLECT FROM STOCKHOLDERS

§ 307. Equitable Receivers Can Not Collect Double Liability. The double liability is generally fixed by statute upon the owners of stock in banking and other corporations that earn their profits out of the money of others and it is sometimes provided as in the case of national banks for example, that in the event of the failure the receiver can collect what is due on the statutory liability, but in the absence of some law giving him the right to do so a receiver can not maintain a suit on a double liability statute which makes the double liability run to the creditor alone.⁴⁷

The ordinary equitable nonstatutory receiver of an insolvent corporation makes his title (whatever title that is, either equitable or otherwise) through the corporation. He can not through his appointment acquire that which the corporation never had. He represents the creditors of the corporation in the administration of his trust, but his trust relates only to the corporate assets. The liability of the stockholders, at least the double liability, may be regarded as a collateral statutory obligation of the stockholders for the benefit of the creditors by which the former become sureties to the latter for the debt of the corporation.⁴⁸ Neither a receiver nor an assignee under a voluntary general assignment for the benefit of creditors, each of whom represents creditors as well as the insolvent, acquires any right to enforce a collateral obligation given to a creditor or to a body of creditors by a third person for the payment of the debts of the insolvent.⁴⁹

The corporation itself can not enforce the double liability. It is no part of the assets.⁵⁰ The double liability of a stockholder created by the Constitution of 1865 of Missouri could not be enforced by the corporation.⁵¹ An ordinary chancery

⁴⁷ Colton v. Mayer (1900), 90 Md. 714, 45 Atl. 874.

⁴⁸ Hicks v. Burns (1859), 38 N. H. 145.

⁴⁹ Jacobson v. Allen (1882), 12 Fed. Rep. 454.

⁵⁰ In re People's Live Stock Co. (1894), 56 Minn. 180, at 185, 57 N. W. 468.

⁵¹ Liberty College v. Walkins (1879), 70 Mo. 1.

receiver acquires no title to property in which the corporation has no interest or to claims which the company could never have sued on nor can he deprive the special creditors of rights of property and of an action secured to them by the statute independent of the company and its property.⁵²

In Maryland the general corporation laws provide specially⁵³ that, "When receivers of the estate or effects of any corporation shall be appointed by a court upon or before the dissolution of any corporation they shall be vested with all the estate and assets of any kind belonging to such corporation." Bank charters provided that the stockholders shall be liable to the amount of their respective shares of stock for all of its debts and liabilities. The Maryland court⁵⁴ held that: "When the stockholders subscribed for stock they assumed a two-fold obligation—one to the corporation for the amount of the stock subscribed and the other to the creditors, to be limited by that amount, the liability to the creditors is enforceable by the creditors alone."

§ 308. Equitable Receivers Can Collect Unpaid Stock without Liability Statute. A creditor having a judgment against a corporation can not sue a stockholder directly on his liability for unpaid stock unless the statute permits such a suit, as for instance, under a special New York statute.⁵⁵ But a judgment creditor may file a creditor's bill and have a receiver appointed of the corporation when he has exhausted his remedy at law, or to avoid a multiplicity of actions at law,⁵⁶ and such receiver may:

First. Bring suit to enforce an assessment, or call already made by the directors of the corporations.

⁵² Farnsworth v. Wood (1883), 91 N. Y. 308.

⁵³ General Code of Maryland, art. 23, sec. 269.

⁵⁴ Colton v. Mayer (1900), 90 Md. 713, 45 Atl. 874.

⁵⁵ New York Statute Laws of 1848, ch. 40, sec. 10; In re Jassory Co. (1910), 178 Fed. 15.

⁵⁶ Wyman v. Bowman (1904), 127 Fed. 265; Peck v. Elliott (1897), 79 Fed. 10.

Second. He may apply to the appointing equity court and that court may itself make the call. After the court has made the call it may order its receiver to bring suit against the stockholder. It is well settled that when stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call if the interests of the creditors require it. The court will do what it is the duty of the company to do.⁵⁷ A stipulation in the contract of subscription that it shall be payable only on the call of the company is valid between stockholders but can not be permitted to defeat the rights of creditors.⁵⁸ It is the duty of the company to make the calls wherever the funds are needed to pay debts. If they are not made the officers of the company violate their trust held both for the stockholders and the company.⁵⁹

Constituting, as unpaid subscriptions do, a fund for the payment of debts (whether the statute of the state of incorporation says they are or not), when a creditor has exhausted his legal remedies against the corporation which fails to make an assessment, he may by bill in equity or other appropriate means, subject such subscriptions to the satisfaction of the judgment⁶⁰ and the stockholders can not then object that no call has been made.⁶¹

Although neither the Missouri statute nor the Missouri constitution provide directly that a receiver can sue to receive unpaid stock, nevertheless it has been held that a chancery court has authority to direct a receiver to bring suit to compel stockholders of a Missouri corporation to contribute the difference between the face value of the stock and the amount paid therefor for the benefit of creditors of the corporation who have given credit in the belief that its stock was paid up in

⁵⁷ *Scovill v. Thayer* (1881), 105 U. S. 143, at 155, 26 L. ed. 968; *Glenn v. Marbury* (1891), 145 U. S. 499, at 510, 36 L. ed. 790, 12 S. C. Rep. 914.

⁵⁸ *Curry v. Woodward* (1875), 53 Ala. 371.

⁵⁹ *Hatch v. Dana* (1879), 101 U. S. 205, at 214, 25 L. ed. 885. Court may make call even though corpora-

tion has already and suit is pending on call, *Brown v. Allebach*, 166 Fed. 488, 496.

⁶⁰ *John W. Cooney Co. v. Arlington Hotel Co.* (1917), 101 Atl. 879; *Big Creek Stone Co. v. Seward* (1895), 144 Ind. 206, 42 N. E. 464.

⁶¹ *Hawkins v. Glenn* (1888), 131 U. S. 319, at 334, 33 L. ed. 184, 9 S. C. Rep. 937.

money or actual property.⁶² Likewise a nonstatutory receiver without special statute in New Jersey was allowed to sue for and collect unpaid stock.⁶³

In an action on a stock subscription the receiver must base his right on the title of the corporation. His claim must be founded upon the theory that the subscription belonged to the corporation, and therefore is a part of the general assets.⁶⁴

From Nonresident Stockholders. No sovereignty nor the court of any sovereignty has any immediate jurisdiction outside of its own territory and a chancery receiver, one not having title to the property by deed from the owner or not having title to the property of a corporation by reason of any statute vesting the property in such receiver, can have no more authority than the court appointing him, to go outside of the state and one to collect unpaid stock, or for any other purpose.⁶⁵ For the power of a statutory receiver to go outside of the state see sec. 299, this chapter.

§ 309. Equitable Receiver Can Collect on Unpaid Stock by Special Liability Statute. The liability of a stockholder on his unpaid stock is by reason of his contract either express or implied, to pay to the corporation. It is a liability to and the property of the corporation held by it for the benefit of its creditors. The ordinary equitable receiver appointed by a court which has jurisdiction of the corporation and of the petitioner who lawfully invokes the exercise of its powers takes all the property and choses in action of the corporation and may lawfully enforce the collection of the unpaid balance on stock by suits and legal proceedings.^{65a} The liability of the defendant to pay the subscription for the stock after its sale may remain a chose in action of the corporation under a constitutional provision and vest in the receiver who had the legal

⁶² *Berry v. Rood* (1901), 168 Mo. 316, 67 S. W. 644.

⁶³ *Easton Bank v. The American Brick Co.* (1906), 70 N. J. Eq. 722, 64 Atl. 1095.

⁶⁴ *Marion Trust Co. v. Blish*

(1908), 170 Ind. 686, 85 N. E. 344, and cases cited.

⁶⁵ *Booth v. Clark* (1854), 17 How. 322, 15 L. ed. 164.

^{65a} *John W. Cooney Co. v. Arlington Hotel Co.* (1917), 101 Atl. 879.

capacity to enforce it by any proper action at law or proceeding in equity.⁶⁶

A number of different liability acts have existed in New York and the rights of a receiver to collect from the stockholder vary with the different acts. Under the Act of 1811 stockholders were personally liable for debts of the company only in the event of its dissolution.⁶⁷ This was an absolute liability to the extent of the amount of their stock, to pay all the debts of the company existing at the time of its dissolution. A receiver was permitted to bring suit under the statute and collect from the stockholders.⁶⁸

However, the liability of a stockholder under the Act of 1848 is a several individual liability of each stockholder directly to the creditors as have complied with the requisite conditions precedent. There is no statutory provision by which the rights of such creditors can be vested in a receiver of the corporation⁶⁹ neither does any such right of action pass to a trustee in bankruptcy.⁷⁰

The Act of 1852 has by its term no application to corporations formed under the Act of 1848. After a dissolution under the Act of 1852, no creditor could maintain a separate action against a stockholder.⁷¹

When an action has been originally brought by a corporation to recover an unpaid balance on a subscription to the capital stock of a corporation and a receiver is appointed of such corporation, the action can be continued in the name of the receiver under the New York code.⁷²

⁶⁶ *Wyman v. Bowman* (1904), 127 Fed. 265; *Van Pelt v. Gardiner* (1898), 54 Neb. 701, at 711 and 712, 75 N. W. 874; *Wyman v. Williams* (1897), 52 Neb. 833, at 834, 73 N. W. 285.

Wyman v. Williams (1897), 52 Neb. 833, at 834, 73 N. W. 285.

⁶⁷ *Guy Kendall v. Corning* (1882), 88 N. Y. 134.

⁶⁸ *Walker v. Crain* (1853), 17 Barb. 128; *Story v. Farnum* (1862), 25 N. Y. 214; *Guy Kendall v. Corn-*

ing (1882), 88 N. Y. 141; *Farnsworth v. Wood* (1883), 91 N. Y. 315.

⁶⁹ *Farnsworth v. Wood* (1883), 91 N. Y. 315.

⁷⁰ *In re Jassory Co.* (1910), 178 Fed. 515.

⁷¹ *Guy Kendall v. Corning* (1882), 88 N. Y. 135.

⁷² Code, sec. 121; *Phoenix Co. v. Badger* (1876), 67 N. Y. 299; see also, under Ohio statute, *Clarke v. Thomas* (1877), 34 O. S. 46.

Under the New Jersey statute⁷³ a receiver may maintain a suit against the recipients of stock to require them to contribute, for the benefit of creditors, such proportion of the amount unpaid upon the shares as might be required to satisfy the debts of the company.⁷⁴

Massachusetts has a special statute providing for the liability of stockholders.⁷⁵

The provision of the Nebraska Constitution⁷⁶ prevents the original subscriber relieving himself from his liability by selling his stock or otherwise.⁷⁷

From Nonresident Stockholders. A statute which provides either directly or indirectly for a receiver bringing suits to recover from stockholders for their unpaid stock does not often do more than codify or restate the rules and usage of equity to the effect that a receiver can collect those choses in action or claims which the corporation could collect. If the receiver by the statute is not made a quasi assignee of the claim of the corporation or the claims of creditors against the stockholders, as is frequently the case under double liability statutes, then it is hard to conceive how an ordinary equitable receiver, even with a so-called single or unpaid stock liability statute existing, can go into a foreign corporation and bring suit against a stockholder in that foreign jurisdiction.⁷⁸

The test as to whether a receiver has power to sue in a foreign sovereignty to collect single or double liability must be this: has he title by the statute of the state where he was appointed, or has he title by assignment or otherwise which makes him an assignee or quasi assignee?^{78a} If he has not title he can not sue. A corporation, however, because it has title

⁷³ Section 5 (Rev. 1877, p. 178, Gen. Stat., p. 910).

⁷⁴ In re Jassody Co. (1910), 178 Fed. 515; Eastern B. K. v. American Brick (1905), 70 N. J. Eq. 726, 64 Atl. 1095, L. R. A. (N.S.) 271, 10 Ann. Cas. 84; Holcombe v. Trenton, 80 N. J. Eq. 122, 82 Atl. 618; Donald v. American, etc., Co., 62 N. J. Eq. 729, 48 Atl. 771, 1116.

⁷⁵ Public Statutes of Massachusetts, ch 106, secs. 60 et seq.

⁷⁶ Const. of Nebraska, art. XII, sec. 4.

⁷⁷ Wyman v. Bowman (1904), 127 Fed. 257.

⁷⁸ Howarth v. Angle (1900), 162 N. Y. Rep. 188, 65 N. E. 489.

^{78a} Delaware receiver is quasi-assignee, John W. Cooney Co. v. Arlington Hotel Co. (1917), 101 Atl. 879.

to the chose in action and is a party to it, may sue in a foreign jurisdiction to collect the single liability.⁷⁹

§ 310. Equitable Receivers Can Collect Double Liability by Statute. Under the Ohio Constitution and the statutes⁸⁰ made pursuant thereto, when a creditor brings a suit to charge a stockholder a receiver may be appointed therein, and he may, among other things, collect the statutory double liability. Likewise the procedure statutes to collect stock liabilities in Minnesota⁸¹ being "An act to provide for the better enforcement of the liability of stockholders of corporations." Likewise the National Banking Act provides for the receiver bringing suits to enforce the double liability.⁸²

From Nonresident Stockholders. When a corporation goes into the hands of a receiver or when attempts are made to collect against stockholders on their unpaid stock by a receiver appointed after judgments are obtained against local stockholders, the question often arises, can such a receiver go into a foreign state and recover the amount of an assessment laid by the local court where the receiver is appointed? The cases of *Booth v. Clark*, 17 How. 322; *Hale v. Harris*, 198 U. S. 561, hold flatly that a chancery receiver having no other authority than that which would arise from his appointment as such could not maintain an action in another jurisdiction. An Ohio case, *McLeod v. Bank*,⁸³ seems to be against this line of decisions.

However, the latest United States Supreme Court case, *Converse v. Hamilton*,⁸⁴ in construing the status of a receiver appointed under the Minnesota laws, ch. 272, Laws 1899, held that such a receiver was a quasi assignee and so a representa-

⁷⁹ *Anglo-American L. Co. v. Dyer* (1902), 181 Mass. 593, 64 N. E. 416. Delaware receiver is by statute a quasi-assignee, *John W. Cooney Co. v. Arlington Hotel Co.* (1917), 101 Atl. 879.

⁸⁰ Ohio Gen. Code (1910), sec. 8690 (R. S., sec. 3260) et seq.

⁸¹ Minnesota Laws (1899), ch. 272.

⁸² *King v. Pomeroy* (1903), 121

Fed. 287, construing Act of June 3, 1864, ch. 106 (13 Stat. 99, and sec. 12 of the act (sec. 5151, R. S.), U. S. Comp. St. 1916, p. 12046), 39 Stat. 121.

⁸³ *McLeod v. Bank* (1882), 38 O. S. 174.

⁸⁴ *Converse v. Hamilton* (1911), 224 U. S. 243, 56 L. ed. 749.

tive of the creditors and as such vested with the authority to maintain an action, that the liability of the stockholders is contractual and not penal.

“Undoubtedly the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of the stock, in most cases, arises from the voluntary act of the stockholders, he must be regarded as having agreed or contracted to be subject to the obligation.”⁸⁵

A statutory receiver (that is, an equitable receiver with statutory powers), under the Ohio statutes,⁸⁶ is more than a chancery receiver. The legislature authorized his appointment by the court to sue for and recover both beyond and within the limits of Ohio, the amounts due under the double liability of the stockholders and the court pursuant of such legislative authorization appointed him for that purpose. He possessed the same authority and power as if he had been directly named and appointed by the legislature.⁸⁷

§ 311. Statutory Receivers of Dissolved Corporation Can Collect Unpaid Stock. When a corporation has been dissolved the power of the directors to make calls on shares ipso facto comes to an end,⁸⁸ and an equity court being able only to enforce the choses in action or rights of the corporation can not make a call. The only power to make calls is that which the statute gives to the receiver or liquidator if any.⁸⁹

It is provided by Ohio General Code, sec. 11946, that the receiver of a dissolved corporation who is appointed under secs. 11938 et seq. has the power to recover as follows: “If there be a sum remaining due upon a share of stock subscribed in the corporation, the receiver immediately shall proceed to

⁸⁵ Mr. Justice Shiras in *First Nat. Bank v. Hawkins* (1898), 174 U. S. 364, at 372, 43 L. ed. 1007.

⁸⁶ Ohio Gen. Code, secs. 8686 et seq., as amended April 16, 1900.

⁸⁷ *Irvine v. Elliott* (1913), 203 Fed. 104.

⁸⁸ *Fowler v. Broad's Patent N. Light Co.* (1893), 1 Ch. D. 724.

⁸⁹ *Fowler v. Broad's Patent N. Light Co.* (1893), 1 Ch. D. 724.

recover it unless the person so indebted is wholly insolvent. For that purpose he may prosecute an action without the consent of any creditor of the corporation."

Under the Ohio Winding-Up Act of 1867,⁹⁰ the Ohio Supreme Court said, "It is his duty, among other things, to collect all outstanding liabilities, including moneys due from subscribers for stock." The subscriber was made to pay his part of a judgment against the corporation as would be his fair proportion of the sum necessary to discharge the debts. His proportion was based on a balance due and unpaid on his subscription.

It has been held in Ohio that an action under this Ohio statute against a stockholder is a common-law action.⁹¹

From Nonresident Stockholders. No state or sovereignty can dissolve a corporation except the state or sovereignty which created it, therefore no other state or the courts of such state can appoint a receiver with power to dissolve a corporation. If the corporation is dissolved, it is hard to conceive that the receiver can enforce a call already made against stockholders or how equity can make the call and order the receiver to enforce it, because all actions for and against a corporation die with the corporation, unless, however, the creating state has made a statute providing that after a corporation is dissolved a receiver may be appointed who may have the right to enforce the single or double liability. If this receiver is a quasi assignee and the statute permits him to enforce the single liability it would seem he could go into a foreign state and enforce it as well as he could enforce the double liability. The laws of the creating sovereign relating to the dissolution of corporations are a part of its organic law, and a stockholder when he takes stock consents that the corporation in the event of its dissolution be wound up in pursuance of the law of the sovereign creating it.⁹²

⁹⁰ Statutes of Ohio, sec. 243, 72 Ohio Laws, 137.

⁹¹ Smith v. Johnson (1898), 57 Ohio St. 486, 49 N. E. 693.

⁹² Groom v. Mortimer Land Co. (1912), 189 Fed. 852.

§ 312. Statutory Receivers of Dissolved Corporation Can Collect Double Liability. Ohio General Code, sec. 11945 (R. S., sec. 5658), under the heading "Dissolution of Corporations" sets forth the powers of such receiver and states specifically that the receiver shall be vested with all the estate, real or personal, of the corporation.

Ohio General Code, sec. 11946 (R. S., sec. 5659), authorizes such receiver "if there be a sum remaining due upon a share of stock subscribed in the corporation, the receiver immediately shall proceed to recover it."

Taking Ohio General Code, sec. 11945, alone the receiver would not have power to collect double liability any more than a so-called chancery receiver, because although the receiver under sec. 11945 is vested with the title to the estate of the corporation that estate can not include a right of a creditor to collect from a stockholder under the double liability statutes. That statement of General Code, sec. 11946, "a sum remaining due upon a share of stock subscribed in the corporation," must of course include so-called unpaid subscriptions, but can it include the double liability? If the powers of the receiver by reason of General Code, sec. 11946, are not enlarged, beyond what they were under General Code, sec. 11945, he can not recover the so-called double liability. But can the term "remaining due" apply to the double liability? No part could be remaining due of the double liability unless an ascertainment of the amount or amounts had been determined by a court of law and judgments entered. It may well be that a receiver, when such judgments were properly brought under the jurisdiction of the court, could collect them. But it is hard to construe the statute as meaning that such a receiver could initiate a proceeding to collect the double liability of stockholders.

Cases are found in Ohio when such receiver has proceeded to collect on unpaid subscriptions,⁹³ but no case is found

⁹³ *Smith v. Johnson* (1898), 57 O. S. 486, 49 N. E. 693.

where he has instituted such against creditors to collect the double liability. Our supreme court, in 1866,⁹⁴ before the state General Code, sec. 11946, or its predecessors was passed, said that an averment that the statutory liability was included in an assignment and transferred to the general assignees of the corporation had no legal effect. Cases in other states with analogous provisions in the constitution and statutes hold that a receiver of a dissolved corporation can not enforce the double liability.⁹⁵

The Constitution of Ohio, art. 13, sec. 3, provides in addition to the liability on the unpaid stock as follows: "Except that stockholders of corporations authorized to receive money on deposit shall be held individually responsible equally and ratably * * * to the extent of the amount of their stock therein." This double liability is not for any sum remaining due upon a share, but is a liability secondary to the primary stock liability and is to the extent of the amount of their stock. It is hard to see how this double liability comes within General Code, sec. 11946, or could be collected by a receiver appointed of a dissolved corporation as the Ohio statutes now stand.

From Nonresident Stockholders. No court without special power from the legislature can dissolve a corporation, therefore receivers or liquidators of dissolved corporations are purely statutory and their powers and duties are prescribed. If the legislature vests the title to the property in the receiver then he is an assignee or quasi assignee and may sue in foreign jurisdiction on choses in action belonging to the corporation. Unless the statutes of the state creating the corporation give the receiver or liquidator power to collect the double liability he has no power either at home or abroad. If he has the power at home and is a quasi assignee, and a representative of the creditors, and there is no statute to the contrary, it would seem he would have the power to collect abroad.⁹⁶

⁹⁴ *Wright v. McCormack* (1866), 17 O. S. 86, at 94.

⁹⁵ *Farnsworth v. Wood* (1883), 91 N. Y. 308; *Liberty v. Watkins* (1879), 70 Mo. 13; *Jacobson v.*

Allen (1882), 12 Fed. 454; *In re Peoples Live Stock Ins. Co.* (1894), 56 Minn. 180, 57 N. W. 468.

⁹⁶ See *Converse v. Hamilton* (1911), 224 U. S. 243, at 260, 56 L. ed. 749.

§ 313. Receiver's Suit on Unpaid Stock One at Law. A stockholder at common law is not liable for the debts of a corporation, but the capital stock is substituted for the individual liability which exists in a personal transaction and in a partnership. However, by the common law, the stockholders of an incorporated company are liable to pay their subscriptions if such payment be necessary to discharge the debts of the company.⁹⁷

A court of equity has the right to authorize the receiver to make a call where the corporation has failed to do so.⁹⁸ When the court of equity has declared the necessity to make the call it may order the receiver to call the amount of the unpaid subscriptions and to enforce the payment of such unpaid subscriptions by suit if necessary against each of the delinquent stockholders.⁹⁹ The suit which the receiver brings against the stockholder to recover on his unpaid stock is an action at law. The corporation before the receivership had the power to enforce the express or implied contract of the stockholder to pay and the character of the action is not changed when the receiver brings it.¹

The ordinary subscription is the individual undertaking of the subscriber. It is a contract directly between him and the corporation and, unless unusual conditions exist, it is in no wise affected by the terms of the others; it is a several and not a joint contract, in other words, a simple promise to pay.²

“A distinction is drawn between one who holds his stock by transfer and an original subscriber. The former may, in the absence of any fraudulent purpose, discharge himself from

⁹⁷ Hood v. McNaughton (1892), 54 N. J. L. 427, 24 Atl. 497.

⁹⁸ Scovil l. Thayer (1881), 105 U. S. 143, at 155, 26 L. ed. 968; Glenn v. Marbury (1892), 145 U. S. 499, 36 L. ed. 790; Barkalow v. Totten (1895), 53 N. J. Eq. 576, 32 Atl. 2; Hood v. McNaughton (1892), 54 N. J. L. 427, 24 Atl. 497.

⁹⁹ Barkalow v. Totten (1895), 53 N. J. Eq. 574, 32 Atl. 2.

¹ Hood v. McNaughton (1892), 54 N. J. L. 427, 24 Atl. 497; Barkalow v. Totten (1895), 53 N. J. Eq. 574, 32 Atl. 2.

² Smith, Rec., v. Johnson (1898), 57 O. S. 490, 49 N. E. 693.

liability for unpaid installments by due transfer of his shares while the latter can not obtain immunity in that way.''³

§ 314. Receiver's Suit on Double Liability One in Equity.

Since a corporation has not the right to collect the double liability, and since it is a right running to the stockholder by special constitution, or statutory provisions, the ordinary equitable receiver who takes the assets and frequently even the choses in action of the corporation does not get the right of creditors which does not belong to the corporation.

However, states may pass statutes providing how a creditor or receiver may bring suit to enforce among other liabilities the double liability,⁴ and the enforcement of such a liability is equitable in its nature.⁵ The fact that the right of action is given by statute makes it none the less equitable action.⁶

§ 315. Receiver's Bill of Discovery to Disclose Owners of Stock. Where a receiver has been instructed by the court appointing him to collect from holders of stock certain installments to pay debts and he does not know the names of the persons against whom he intends to bring suit he may bring a bill against persons who stand in some relation to him or to the property in order to discover who the persons are against whom he may proceed for relief.⁷

ENGLISH WINDING-UP PROCEEDINGS

§ 316. Call in Winding-Up Proceedings—English Companies Act, 1862. The English Companies, Act of 1862 creates a scheme for the payment of the debts of a company in lieu of the old course of issuing execution against individual mem-

³ Hood v. McNaughton (1892), 54 N. J. L. 428, 24 Atl. 497.

⁴ Ohio Gen. Code, secs. 8690, et seq.; R. S., secs. 3260, et seq.; Zieverink v. Kemper, 50 O. S. 208, 34 N. E. 250.

⁵ Irvine v. Elliott (1913), 203 Fed. 94.

⁶ Zieverink v. Kemper (1893), 50 O. S. 208, 34 N. E. 250.

⁷ Post, etc., v. Railway (1887), 144 Mass. 341, 11 N. E. 540; Brown v. McDonald (1905), 133 Fed. 897; Brown v. Magee (1906), 146 Fed. 765; Kurtz v. Brown (1906), 152 Fed. 372; Brown v. Palmer (1907), 157 Fed. 797; Brown v. Artman (1908), 166 Fed. 485.

bers. It removes the rights and liabilities of parties out of the sphere of the ordinary relation of debtor and creditor to which the law of set-off applies. Taking the act as a whole, the call is to come into the assets of the company to be applied with the other assets in payment of debts. To allow a set-off against the call would be contrary to the whole scope of the act.⁸

Until the call is made there is nothing more than a liability to contribute. This, indeed, creates a debt, but the debt does not accrue till a call is made. The power to make calls is only to satisfy the debts,⁹ and liabilities of the company and the costs, charges and expenses of winding it up and for the adjustment of the rights of the contributors amongst themselves. But if the whole of the amount unpaid upon the shares were required to be paid up, more might be raised than would be requisite for these purposes, and it might be that a contributory thus paying in advance might lose all that he had so paid in the event of any of his cocontributories becoming insolvent.¹⁰

§ 317. Collecting Unpaid Stock by Receiver or Liquidator.

When a company is ordered to be wound up, the power of its directors under its constitution to make calls on shares *ipso facto* comes to an end, and the only power to make calls is that which is by statute given to the liquidator acting in the winding up.

Therefore, when uncalled capital has been charged by the company in favor of debenture holders, and the company is ordered to be wound up, the court has no jurisdiction to order either a receiver appointed in an action brought to enforce the debentures, or the liquidator, to make a call in the action, but can only order the liquidator to make the call in the winding up. The receiver in the action may, however, be

⁸ Grissel's case (1866), L. R.,
1 Ch. App. 528, at 534.

⁹ Grissel's case (1866), L. R.,
1 Ch. App. 528, at 535.

¹⁰ Grissel's case (1866), L. R.,
1 Ch. App. 528, at 535.

empowered to take proceedings in the name of the liquidator for getting in the call.¹¹

§ 318. Situation of Stockholder of Unpaid Stock Being Also a Creditor. If the amount of an unpaid call can not be satisfied by a set-off of an equivalent portion of a debt due to the member of a company upon whom it is made, it necessarily follows in the last place that the amount of such call must be paid before there can be any right to receive a dividend with the other creditors. The amount of the call being paid, the member of the company stands exactly on the footing of the other creditors with respect to a dividend upon the debt due to him from the company. The dividend will be, of course, upon the whole debt and the members of the company will, from time to time when the dividends are declared, receive them in like manner when either no call has been made, or having been made, when he has paid the amount in.¹²

§ 319. Stockholders' Set-Off on Winding Up of Unlimited Company. A shareholder in an unlimited company which is being wound up by the court, may be allowed to set off a debt due to him from the company on an independent contract against calls made in his shares under the winding up.¹³ A member of an unlimited company is liable to contribute to any amount until all the liabilities of the company are satisfied, and therefore it signifies nothing to the creditors whether a set-off is allowed or not. But in respect to a member of a company with limited liability if a set-off were allowed against a call, it would have the effect of withdrawing altogether from the creditors part of the funds applicable to the payment of their debts.¹⁴

¹¹ *Fowler v. Broad's Patent Night Light Co.* (1893), 1 Ch. D. 724.

¹² *Grissell's case* (1866), L. R. 1 Ch. App. 528, at 536.

¹³ *Werks' case* (1870), 10 L. R. Eq. 312.

¹⁴ *Grissell's case* (1866), L. R. 1 Ch. App. 528, at 536.

§ 320. Stockholders' Set-Off on Winding Up of Limited Company. A shareholder in a limited company who is also a creditor of the company under a contract is not, in the event of the company being wound up, entitled to set off the debt due to him against the calls, nor to set off against the calls a dividend which may hereafter come to him. But upon payment of all calls which have become due, he is entitled to receive dividends at the same time and at the same rate with the other creditors. If a set-off were allowed against a call it would have the effect of withdrawing altogether from the creditors part of the funds applicable to the payment of their debts.

Members of companies are entitled to satisfaction of their debts *pari passu* with the rest of the creditors.¹⁵

In the case of winding up of the court or under the supervision of the court, the right to bring an action is expressly excluded, and the allowance of a set-off is discretionary with the court of chancery. But in the case of a company which is being voluntarily wound up and in no way subject to the control or intervention of the court of chancery. *Prima facie*, therefore, it is for the convenience of the company that the set-off should be allowed. There are provisions in the voluntary part of the Winding-Up Act ¹⁶ that, "the liquidators may, at any time after the passing of the said resolution for winding up the company and before they have ascertained the sufficiency of the assets of the company, call in any or all the contributories for the time being settled in the list of contributories to the extent of their liability to pay all or any sums they deem necessary to satisfy them," etc. Set-off is allowed in such a case.¹⁷

¹⁵ Grissell's case (1866), L. R. 1 Ch. App. 528; Calisher's case (1868), L. R. 5 Eq. 217.

¹⁶ 25 and 26 Vic., ch. 89, par. 138.

¹⁷ Brighton Arcade Co. v. Dowling (1868), L. R. 3 C. P. C. 175, at 183.

CHAPTER XVII

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NATURE OF BANKRUPTCY RECEIVERSHIPS

§ 321. **Distinctive Features of Bankruptcy Receiverships.**

Receiverships in bankruptcy differ from other receiverships mainly by reason of the fact that proceedings in bankruptcy are in rem; ordinary receiverships are predicated on proceedings in personam. Receiverships in bankruptcy are governed and affected by statutes which are not applicable to ordinary receiverships. Receivers in bankruptcy in the United States are only appointed by the United States courts sitting in bankruptcy, therefore decisions on the subject of receivers in bankruptcy in the United States are mainly confined to the United States federal courts. By reason of the above characteristics of receiverships in bankruptcy and the number of cases reported we have thought fit to devote a whole chapter to the subject. Such parts of the United States Bankruptcy Act of 1898, as amended in 1903 and 1910, as directly affect receivership in bankruptcy will be found printed in Vol. II, page 1105, of this work; also such parts of the General Rules in Bankruptcy as affect receivership in bankruptcy as promulgated by the Supreme Court of the United States in October, 1898,¹ and Bankruptcy Forms, in Vol. II, this work. Because many of the English decisions in bankruptcy are necessarily predicated on the English Bankruptcy Act, we have printed in Vol. II at sec. 1233, such parts of that act as directly affect receivership.

§ 322. **Proceedings in Bankruptcy in Rem.** The distinction between proceedings in rem and proceedings in personam must

¹ Reported in 89 Fed. VII.

always be kept in mind when reading the decisions on the subject of bankruptcy proceedings, litigation and receivership in connection therewith.

Says Chief Justice Holmes, then of the Massachusetts Supreme Court, concerning proceedings in rem and proceedings in personam: "It is certain that no phrase has been more misused. * * * If the technical object of the suit is to establish a claim against some particular person, with a judgment which generally, in theory at least, binds his body, or to bar some individual claim or objection so that only certain persons are entitled to be heard in defense, the action is in personam, although it may concern the right to or possession of a tangible thing. *Mankin v. Chandler*, 2 Brock, 125, 127. If, on the other hand, the object is to bar indifferently all who might be minded to make an objection of any sort against the right sought to be established and if anyone in the world has a right to be heard on the strength of alleging facts which if true show an inconsistent interest, the proceeding is in rem. *Freeman*, Judgments, 4th ed., sec. 606 ad fin.

"All proceedings, like all rights, are really against persons. Whether they are proceedings or rights in rem depends on the number of persons affected. Hence the res need not be personified and made a party defendant as happens with the ships in admiralty; it need not even be a tangible thing at all, as sufficiently appears by the case of the probate of wills. Personification and naming the res as defendant are mere symbols, not the essential matter. They are fictions conveniently expressing the nature of the process and the result, nothing more."²

It therefore follows that an adjudication of bankruptcy upon a petition in an involuntary proceeding is a judgment in rem³ in the sense that it determines the status of the bankrupt, but the ordinary proceedings taken in bankruptcy proceedings to decide questions arising in it are not proceedings in rem. A

² *Tyler v. Court of Registration* (1900), 175 Mass. 71, at 76, 55 N. E. 812.

³ *In re Benedict* (1904), 127 Fed. 760 (1905), 140 Fed. 55; *In re Beals* (1902), 116 Fed. 530.

proceeding, for instance, to determine a disputed claim would not bind any party but the parties to it.

Likewise the proceeding to pass the receiver's account is not a proceeding in rem, because it affects and binds a party or parties.⁴

Says Mr. Justice Day of the Supreme Court of the United States in 1911: "The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition."⁵

Such a petition when filed is held to be a caveat to all the world and to operate on such assets like an attachment or injunction. At the moment the petition is filed creditors acquire a right in rem against the assets.⁶

What is done in the bankruptcy court in respect to "proceedings in bankruptcy" is binding upon creditors, whether or not they have actual notice or knowledge of the pendency of the bankruptcy proceedings.⁷ Such proceedings are proceedings against all the world.⁸

A proceeding in bankruptcy is *sui generis*. The filing of an involuntary petition is not the commencement of a suit against the failing debtor to receive debts due. It contemplates rather the collection and distribution of an estate.⁹ The very property sought to be reached has been by virtue of the act of Congress brought sub modo under federal influence and control by the filing of the involuntary petition which has, so to speak, imposed a status upon all the property of the alleged bankrupt everywhere.¹⁰

⁴ Whitney v. Wenman (1905), 140 Fed. 959.

⁵ Acme Harvester Co. v. Beekman Lum. Co. (1911), 222 U. S. 300, at 307, 56 L. ed. 208. See *In re Billing* (1906), 145 Fed. 395, at 398.

⁶ *In re Benedict* (1905), 140 Fed. 55, at 60; *Sexton v. Dreyfus* (1910),

219 U. S. 339, at 345, 55 L. ed. 244.

⁷ *In re Billing* (1906), 145 Fed. 395, at 398.

⁸ *Johnson v. United States* (1908), 163 Fed. 30, at 32.

⁹ *In re Benedict* (1905), 140 Fed. 55, at 59.

¹⁰ *Bank v. Sherman* (1879), 101

§ 323. Administration by Bankruptcy Court Ordinarily Equitable. The bankruptcy court is ordinarily a court of equity.¹¹ A proceeding in bankruptcy is said to be a proceeding in equity,¹² and a United States district court sitting in bankruptcy, whether it is exercising its primary or ancillary jurisdiction, is a court of equity.¹³ Says Mr. Chief Justice White¹⁴ concerning sec. 70b of the Bankrupt Act as follows: "This provision makes it manifest that it was the purpose of congress to give bankruptcy courts full and complete equitable powers in matters of the administration and sale of the bankrupt estate. * * *"

A court of bankruptcy, in determining conflicting claims to property in its custody, acts essentially as a court of equity.¹⁵ Although controlled by the bankruptcy statutes, such a court should do equity guided by the well-defined and well-established principles of equity jurisprudence.¹⁶

§ 324. Receiver in Bankruptcy Statutory with Equity Powers. A statutory receiver, in the strict meaning of the term, is one who is appointed by reason of the statute when without the statute the court would not have power to appoint. The main distinction between a so-called equitable receiver and a statutory receiver is, that an equitable receiver has all the powers which the usages and rules of equity generally give to receivers, while a statutory receiver, deriving his powers from the statute, must look to the statute for the duty or duties imposed upon him. He possesses such power only as the statute confers, or such as may be fairly inferred from the general scope of the law of his appointment. The powers of a court of

U. S. 400, 25 L. ed. 866; Mueller v. Nugent (1901), 184 U. S. 1, at 16, 45 L. ed. 711.

¹¹ Le Master v. Spencer (1913), 203 Fed. 210, at 216.

¹² In re Isaacson (1909), 175 Fed. 202, at 293; In re Clark Coal & Coke Co. (1909), 173 Fed. 658, at 663; see sec. 322, *supra*.

¹³ Fidelity Trust Co. v. Gaskill (1912), 195 Fed. 865, at 861.

¹⁴ Robertson v. Howard (1912), 229 U. S. 254, at 263, 57 L. ed. 1174.

¹⁵ Orinoco Iron Co. v. Metzel (1916), 230 Fed. 40, at 47.

¹⁶ In re Syracuse Gardens Co. (1916), 231 Fed. 284, at 288.

bankruptcy to appoint a receiver, and his powers after appointed, must be ascertained by looking to the Bankruptcy Act, sec. 2, clause 3, and inferentially clause 15 and clause 5.

"The Bankrupt Law of 1867 contained no express provision for the appointment of receivers; still the power was exercised by the courts under that law in appropriate cases."¹⁷

Under the English Bankruptcy Act of 1869 the court of bankruptcy was held to be a court of equity as well as a court of law, and had power to grant equitable execution.¹⁸

As to the American Bankruptcy Act of 1898, "besides the express delegation of authority¹⁹ courts of bankruptcy have general equity powers,²⁰ and by virtue of these general equity powers may in suitable cases appoint receivers."²¹

The correct interpretation of the act we believe to be, follows: "When the Bankruptcy Act speaks concerning the powers of a receiver in bankruptcy, the act must govern, but when the act does not speak the court 'may make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of the act.'"²²

We wish, however, to call the attention of the reader to the case *In re Harris*, which apparently holds that the powers of a receiver in bankruptcy are only those conferred upon him by the statute itself.²³ The decision in the *Harris* case was delivered orally, and we believe the judge failed to take into consideration clause 15 of sec. 2 of the Bankruptcy Act.

Said Mr. Chief Justice Fuller of the United States Supreme Court in 1902:²⁴ "In order to the adequate enforcement of the

¹⁷ *In re Fixin & Co.* (1899), 96 Fed. 748, at 753; *Keenan v. Shannon*, Fed. Cas. No. 7640; *Lansing v. Manton*, Fed. Cas. No. 8077.

¹⁸ *In re Gondie* (1896), 2 Q. B. D. 483.

¹⁹ Bankruptcy Act (U. S. 1898), sec. 2, cl. 3, 5, 15.

²⁰ *Blake, Moffett & Towne v.*

Francis, 89 Fed. 691; *In re Fixin & Co.* (1899), 96 Fed. 748, at 753.

²¹ *In re Fixin & Co.* (1899), 96 Fed. 748, at 753.

²² United States Bankruptcy Act of 1898, sec. 2, cl. 15.

²³ *In re Harris* (1907), 156 Fed. 875.

²⁴ *In re Watts & Sachs* (1902), 190 U. S. 1, at 30; 47 L. ed. 933.

provisions of the bankruptcy law, it is necessary that the powers of courts in bankruptcy should be and they are most comprehensive.”

JURISDICTION OF BANKRUPTCY COURTS

§ 325. Jurisdiction of Courts of Bankruptcy—Generally.

The jurisdiction of the United States courts of bankruptcy is, by reason of the United States Bankruptcy Statute, passed by congress²⁵ as empowered by the constitution of the United States,²⁶ which provides that congress shall have power “* * * To establish * * * uniform laws on the subject of bankruptcies throughout the United States.”

Said Chief Justice Fuller, in *Mueller v. Nugent*, 184 U. S. 1, 14: “It is as true of the present law (1898) as it was of that of 1867, that the filing of the petition is a caveat to all the world and in effect an attachment and injunction, *Bank v. Sherman*, 101 U. S. 403, and on adjudication, title to the bankrupt’s property became vested in the trustee, secs. 70, 21e, with actual or constructive possession and placed in the custody of the bankruptcy court.”²⁷

The jurisdiction of the bankruptcy court is asserted, not by filing of a petition and getting service on the bankrupt, but by merely filing the petition as is provided in the bankruptcy act. After the petition is filed the jurisdiction of the bankruptcy court becomes exclusive. The reason why the jurisdiction of the bankruptcy court becomes exclusive and why the property is in custodia legis is because it is the purpose of the bankruptcy law to hold the property of the bankrupt intact wherever situated from the time of filing the petition. It is necessary that these proceedings should be in rem because it is the further purpose of the bankruptcy law to place the property of the bankrupt under the control of the court wherever found, with a

²⁵ Act of July 1, 1898, amended 1903 and 1910, and Act of Jan. 28, 1915, ch. 22, sec. 4, amended Sept. 6, 1916, ch. 448, sec. 3, 38 Stat. at L. 804.

²⁶ Const. of U. S., art. 1, sec. 8.

²⁷ Quoted in *Acme Harvester Co. v. Beekman Lum. Co.* (1911), 222 U. S. 300, at 306, 56 L. ed. 208.

view to equal distribution among creditors.²⁸ Before 1910 the opinion prevailed that the district courts of the United States did not have ancillary jurisdiction in bankruptcy.²⁹

In January, 1910, the supreme court³⁰ held that jurisdiction over property of the bankrupt in foreign districts may be exercised by ancillary proceedings in bankruptcy in those foreign districts.³¹

§ 326. Exclusive Jurisdiction of Courts of Bankruptcy.

When property has become subject to the jurisdiction of the bankruptcy court, as that of the bankrupt, whether held by him or for him, jurisdiction exists in the bankruptcy court to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein. Such jurisdiction of the bankruptcy court is exclusive.³²

If the bankruptcy court is not in possession of the property then such jurisdiction is not exclusive.³³

By subdiv. 7, sec. 2, of the Bankruptcy Act of 1898, jurisdiction is conferred in bankruptcy courts to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein provided." Says Townsend, speaking for the United States Circuit Court of Appeals for the Second Circuit, as follows: "In the light of the views expressed by the supreme court in *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. ed.

²⁸ *Acme Harvester Co. v. Beekman Lum. Co.* (1911), 222 U. S. 300, at 307, 56 L. ed. 208; *Robertson v. Howard* (1912), 229 U. S. 254, at 261, 57 L. ed. 1174.

²⁹ *Acme Harvester Co. v. Beekman Lum. Co.* (1911), 222 U. S. 300, at 307, 56 L. ed. 208.

³⁰ *Babbitt v. Dutcher* (1910), 216 U. S. 102, 54 L. ed. 402.

³¹ *Fidelity Trust Co. v. Gaskill* (1912), 195 Fed. 865, at 870.

³² *Whitney v. Wenman* (1904), 198 U. S. 539, at 552, 49 L. ed. 1157; *In re Yaryan Naval Stores Co.*

(1914), 214 Fed. 563, at 565; *In re Watts & Sachs*, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. ed. 933; *Acme Harvester Co. v. Beekman Lum. Co.* (1911), 222 U. S. 300, 32 Sup. Ct. 96, 56 L. ed. 208; *U. S. Fidelity, etc., v. Bray*, 225 U. S. 205, 32 Sup. Ct. 620, 56 L. ed. 1005; *Leidigh Carriage Co. v. Stengel*, 95 Fed. 637, 37 C. C. A. 210; *Orinoco Iron Co. v. Metzel* (1916), 230 Fed. 40, at 44.

³³ *Whitney v. Wenman* (1904), 198 U. S. 539, at 553, 49 L. ed. 1157, citing *First Nat. Bank v. Title T. Co.* (1905), 198 U. S. 280, 49 L. ed. 1051.

1183, decided the same day, and in *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. ed. 814, and *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. ed. 405, it would seem that the controversies in relation to the bankrupt estate, which by reason of the limitations referred to in the clause 'except as herein otherwise provided,' do not come within the jurisdiction of the bankruptcy courts, are those where the trustee must bring an independent suit to assert title to money or property not in the possession or control of the trustee. These conclusions are in accord with the decisions under the former Bankruptcy Act. *Ray v. Norseworthy*, 23 Wall. 128, 134, 23 L. ed. 116." ³⁴

(a) To Determine Liens. After the bankruptcy court has acquired actual possession and control of property, it has been held under subdiv. 7, sec. 2, of the Act of 1898, that such bankruptcy court has power to determine by summary proceedings instituted before the court or in proper cases before the referee in bankruptcy the validity of liens on such property.³⁵

(b) To Determine Ownership. Property within the custody of the bankruptcy court is under the exclusive jurisdiction of such court. Such court has exclusive jurisdiction over the general administration of the bankrupt's estate and has exclusive authority to determine not only the claims of creditors, but also adverse claims, whether by way of ownership or paramount liens.³⁶

By clause 3 of the Twelfth General Order in Bankruptcy applications to the court of bankruptcy "for an injunction to stay proceedings of a court or officer of the United States, or of a state, shall be heard and decided by the judge, but he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report on the facts." ³⁷

³⁴ *In re Kellogg* (1903), 121 Fed. 333, at 335.

³⁵ *In re Kellogg* (1903), 121 Fed. 333, at 335.

³⁶ *Orinoco Iron Co. v. Metzel* (1916), 230 Fed. 40, at 44, and cases cited.

³⁷ General Orders and Forms in Bankruptcy, appendix in 172 U. S. 657; quoted in *White v. Schloerb* (1899), 178 U. S. 542, at 547, 44 L. ed. 1183

Said Mr. Justice Gray, of the United States Supreme Court: "Not going beyond what the decision of the case before us requires, we are of opinion that the judge of bankruptcy was authorized to compel persons, who had forcibly and unlawfully seized and taken out of the judicial custody of that court property which had lawfully come into its possession as part of the bankrupt's property,³⁸ to restore that property to its custody by summary proceedings."³⁹

§ 327. Concurrent Jurisdiction of Courts of Bankruptcy.

The Bankruptcy Act of 1898, as originally enacted, did not confer jurisdiction on the district courts of the United States over suits brought by trustees in bankruptcy to assert title to property as assets of the bankrupt, or to set aside transfers made by the bankrupt in fraud of creditors or by way of preference unless by the consent of the defendant.⁴⁰

The Bankruptcy Act of 1898 provided that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."⁴¹

Congress, by the second clause of sec. 23 of the Act of 1898, unamended, appears to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert title to money or property as assets of the bankrupt against strangers to those proceedings, should not necessarily come within the jurisdiction of the district

³⁸ White v. Schloerb (1899), 178 U. S. 542, at 547, 44 L. ed. 1183.

³⁹ White v. Schloerb (1899), 178 U. S. 542, at 548, 44 L. ed. 1183.

⁴⁰ Bardes v. Hawarden Bank, 178 U. S. 524, 44 L. ed. 1175. See case commented on in Kelley v. Gill, U. S. Sup. Ct., Nov. 5, 1917, No. 411,

Oct. term; Frank v. Vollkommer, 205 U. S. 521, 51 L. ed. 911; Murphy v. John Hoffman (1908), 211 U. S. 562, at 568, 53 L. ed. 327.

⁴¹ Act of Bankruptcy, July 1, 1898, 823b, 30 Stat. at L. 544, ch. 541; Frank v. Vollkommer (1906), 205 U. S. 521, at 524, 51 L. ed. 911.

courts of the United States, "unless by the consent of the proposed defendant."⁴²

However, the Act of 1898 was amended in 1903,⁴³ and under sec. 23b extended the concurrent jurisdiction of courts of bankruptcy to "suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e," and under sec. 70e allowing the trustee to avoid transfers by suits in any court of bankruptcy or any state court which would have had jurisdiction if bankruptcy had not intervened.⁴⁴

Says Mr. Justice Moody, of the Supreme Court of the United States:⁴⁵ "Where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, federal or state. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court having possession of the property has ancillary jurisdiction to hear and determine all questions respecting the title, possession and control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by statute. The jurisdiction in such cases arises out of the possession of the property and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them."⁴⁶

However, neither the Bankruptcy Act of 1898 nor the amendments of 1903 and 1910 did in the least modify the rule that the court which first obtains rightful jurisdiction over the subject-matter should not be interfered with, but with unusual care-

⁴² *Bardes v. Hawarden Bank*, 178 U. S. 524, 44 L. ed. 1175; *Bush v. Elliott* (1905), 202 U. S. 477, at 482, 50 L. ed. 1114.

⁴³ Act of Feb. 5, 1903, 32 Stat. 797, ch. 487, secs. 23b, 60b, 67e, 70e.

⁴⁴ See explanation of amendment of 1903 in *Frank v. Vollkommer* (1906), 205 U. S. 521, at 528, 51 L. ed. 911. See *Kelley v. Gill*, Nov. 4, 1917, U. S. Sup. Ct., No. 411, Oct. term.

⁴⁵ *Murphy v. John Hoffman Co.* (1908), 211 U. S. 562, at 569, 53 L. ed. 327.

⁴⁶ *Murphy v. John Hoffman Co.* (1908), 211 U. S. 562, at 569, 53 L. ed. 327; citing *Wabash Ry. v. Adelbert College*, 208 U. S. 38, at 54, 52 L. ed. 379. See *Kelley v. Gill*, Nov. 4, 1917, U. S. Sup. Ct., No. 411, Oct. term.

fulness guards it in all of its detail, provided the suit pending in the state court was instituted more than four months before the district court of the United States had adjudicated the bankruptcy of the party entitled to or interested in the subject-matter of such controversy.⁴⁷

§ 328. Territorial Jurisdiction of Court Making Adjudication in Bankruptcy. Since strictly bankruptcy proceedings are proceedings in rem, it follows that such proceedings affect all the world, even without notice. In other words, the filing of a petition in bankruptcy is a caveat to all the world, the bankrupt's property from the moment of such filing is affected wherever situated in the United States.⁴⁸ Furthermore, when an adjudication in bankruptcy is made, the status of the bankrupt is fixed and the whole world must take notice of that fact.

The effect of adjudication in bankruptcy is more than a caveat to all the world; it is to transfer to the trustee the title to the bankrupt's property and vest the same in the trustee. The trustee having the title to the property wherever located in the United States may, under proper orders of the bankruptcy court appointing him, sell or otherwise dispose of the property.⁴⁹ Nevertheless, even if one court of bankruptcy has jurisdiction, as just explained, over the res, that does not mean that one court of bankruptcy can extend its process into the territory of another bankruptcy court.⁵⁰

Prior to the ruling of the United States Supreme Court in 1910,⁵¹ it was the general ruling of the federal courts that the court making the adjudication in bankruptcy took exclusive

⁴⁷ *Pickens v. Roy* (1902), 187 U. S. 177, at 180, 42 L. ed. 128; *Frazier v. Southern, etc.*, 99 Fed. 707; *Orinoco Iron Co. v. Metzel* (1916), 230 Fed. 40, at 44; *Murphy v. John Hoffman Co.* (1908), 211 U. S. 502, at 568, 53 L. ed. 327.

⁴⁸ *Robertson v. Howard* (1912), 229 U. S. 254, 57 L. ed. 1174; *In re Granite City Bank* (1905), 137 Fed. 818, at 821; *United States Fidelity*

v. Bray, 225 U. S. 217, 56 L. ed. 1055.

⁴⁹ *Robertson v. Howard* (1912), 229 U. S. 254, at 261, 57 L. ed. 1174.

⁵⁰ *In re Boston-Cerrillos Mines Corporation* (1913), 206 Fed. 794, at 796.

⁵¹ *Babbitt v. Dutcher* (1910), 216 U. S. 102, at 110, 114, 30 Sup. Ct. 372, 54 L. ed. 402, 17 Ann. Cases 969.

jurisdiction and alone collected and determined the titles to and liens upon the property wherever situated, claimed as part of the estate of the bankrupt.⁵²

The ruling in *Babbitt v. Dutcher* has been frequently interpreted to mean that the jurisdiction of the bankruptcy court making the original adjudication in bankruptcy, both as to strictly proceedings in bankruptcy," as well as "of all controversies at law and in equity," was not limited as to its orders by the territorial bounds of the original court of bankruptcy.⁵³

Subsequently the supreme court cases have, however, made a distinction between an original court of bankruptcy having jurisdiction as far as the subject-matter is concerned, wherever that subject-matter may be,⁵⁴ and yet in controversies at law and in equity and in sending out its process being limited to the territorial boundaries of the district court.⁵⁵

(a) As to Proceedings Strictly in Bankruptcy. Said Mr. Justice Van Devanter, of the United States Supreme Court, in 1912: ⁵⁶ "We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estate to money and distribution, the determination of the preferences and privities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist him."

⁵² *Fidelity Trust Co. v. Gaskill* (1912), 195 Fed. 865, at 871.

⁵³ Such an interpretation is found in *Fidelity Trust Co. v. Gaskill* (1912), 195 Fed. 865, at 871.

⁵⁴ *Robertson v. Howard* (1912), 229 U. S. 254, at 261, 57 L. ed. 1174.

⁵⁵ *Acme Harvester Co. v. Beekman*

Lum. Co. (1911), 222 U. S. 300, at 311, 56 L. ed. 208.

⁵⁶ *United States Fidelity Co. v. Bray* (1912), 225 U. S. 205, at 217, 56 L. ed. 1055, quoted with approval by Mr. Chief Justice White in *Robertson v. Howard* (1913), 229 U. S. 254, at 261, 57 L. ed. 1174.

A court of bankruptcy in one state acquires full jurisdiction over land in another state belonging to the bankrupt upon the filing of the petition in bankruptcy. Having such jurisdiction, it possesses the power to order a sale of land or an interest in land in another state or federal judicial district. This is because the effect of the adjudication in bankruptcy is to transfer the title of the property of the bankrupt and vest the same in the trustee, who has the right under the control and authority of the court to administer the same.⁵⁷

Said Mr. Justice White:⁵⁸ "Even if the enlarged powers of a court of bankruptcy over the estate under its control be put out of view and the subject be looked at as a mere question of equitable jurisdiction, it may not be doubted that a court of equity in one state in a proper case could compel a defendant before it to convey property situated in another state. *Fall v. Easton*, 215 U. S. 1, 8, et seq., and cases cited."⁵⁹

Quoting Mr. Justice White again:⁶⁰ "This provision makes it manifest that it was the purpose of congress to give bankruptcy courts full and complete equitable power in matters of the administration and sale of the bankrupt's estate, wholly irrespective of the mere situs of the property, the controlling factor being, not where the property is situated, but did it pass to the trustee and is it part of the estate subject to administration under the direction of the court. In view of the fact that the Bankrupt Act was enacted long after the passage of the Statute of 1893,⁶¹ and of the complete right of administration which the Bankruptcy Act confers over property, real and personal, of the bankrupt's estate, we think it follows that the authority to realize, by way of sale, on the property of the bankrupt's estate, can not be held to be limited by the provisions of the Act of 1893. Indeed, this conclusion is addition-

⁵⁷ *Robertson v. Howard* (1912), 229 U. S. 254, at 261, 57 L. ed. 1174.

⁵⁸ *Robertson v. Howard* (1912), 229 U. S. 254, at 263, 57 L. ed. 1174.

229 U. S. 254, at 261, 57 L. ed. 1174.

⁵⁹ *Robertson v. Howard* (1912), ch. 225; 27 Stat. 751.

⁶⁰ *Robertson v. Howard* (1913),

229 U. S. 254, at 263, 57 L. ed. 1174.

⁶¹ Act of Congress, March 3, 1893,

ally demonstrated by the fact that as recognized by No. 18 of the General Orders in Bankruptcy, in disposing by sale of the property of the bankrupt, a bankruptcy court, as to both real and personal property may, if reason for so doing exists, direct a private sale to be made.”

(b) As to Controversies at Law and in Equity. Section 23(a) of the Bankruptcy Act of 1898 provides: “The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.”⁶²

Section 23(b) provides: “Suits by the trustee shall only be brought or prosecuted in the court where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision (b), section sixty-seven, subdivision (e), and section seventy, subdivision (e).”⁶³

If the controversy at law or in equity concerned, for instance, a claim of adverse title to property of the bankrupt based upon a transfer antedating the bankruptcy, a plenary suit must be brought either at law or in equity by the trustee, in which the adverse claim of title could be tried and adjudicated.⁶⁴

Such a suit can be brought only in a court which would have had jurisdiction of a suit by the bankrupt against the adverse claimant, except where the defendant consents to be sued elsewhere.⁶⁵ Exceptions to this rule are suits for the recovery of

⁶² Quoted in *U. S. Fidelity Co. v. Bray* (1912), 225 U. S. 205, at 217, 56 L. ed. 1055.

⁶³ Acts of Feb. 5, 1903, and June 25, 1910.

⁶⁴ *Babbitt v. Dutcher* (1909), 216 U. S. 103, at 113, 54 L. ed. 402.

⁶⁵ *Babbitt v. Dutcher* (1909), 216 U. S. 103, at 113, 54 L. ed. 402.

property under sec. 60b, sec. 67e, of the Act of 1898, as amended in 1903 and 1910.

(c) As to Sale of Bankrupt's Property. The Supreme Court of the United States has recently said: "A court of bankruptcy in one state acquires full jurisdiction over lands in another state belonging to the bankrupt upon the filing of the petition in bankruptcy. Having such jurisdiction, it possesses the power to order a sale of land or an interest in land in another state or federal judicial district. This is because the effect of the adjudication in bankruptcy is to transfer the title of the property of the bankrupt and vest the same in the trustee."⁶⁶

Generally speaking, the jurisdiction of courts of bankruptcy in the administration of bankrupt estates extends "to all matters of bankruptcy without limitation." It is coextensive with the United States. It knows no state or district boundaries.⁶⁷

This jurisdiction in bankruptcy, as just explained by the supreme court, resembles as far as territorial extent to the jurisdiction of courts of probate because the administration of an estate by a court of probate is a proceeding in rem and all the world must take cognizance of the probate of the will. The jurisdiction of the bankruptcy courts, however, is by reason of the constitution of the United States and the acts of congress and has just as much scope territorially as the constitution and said acts have given such courts.

(d) As to Service of Process. In spite of the jurisdiction of the bankruptcy courts being coextensive with the United States as far as the subject-matter is concerned, one district court in bankruptcy has not jurisdiction to issue an injunction against one not a party to the proceeding and which undertakes to have effect in the distant jurisdiction outside of the territorial jurisdiction of the original district court. Under the

⁶⁶ *Robertson v. Howard* (1912), 229 U. S. 254, 57 L. ed. 1174.

⁶⁷ *Orinoco Iron Co. v. Metzel* (1916), 230 Fed. 40, at 46, citing *Thomas v. Woods*, 173 Fed. 585, at 590, 26 L. R. A. (N. S.) 1180, 19

Am. Cas. 1080; *Lathrop v. Drake*, 91 U. S. 516, 517, 23 L. ed. 414; *Babbitt v. Dutcher*, 216 U. S. 102, at 109, 30 Sup. Ct. 372, 54 L. ed. 402, 17 Am. Cas. 969; *Staunton v. Wooden*, 179 Fed. 61.

Act of 1898 as expounded by *Babbitt v. Dutcher*, 216 U. S. 102, and *Elkus, Petitioner*, 216 U. S. 115, such an injunction might be sought in a district court of the United States where personal service could be had on the party to be enjoined.⁶⁸

There may seem to be an apparent inconsistency between the statement of the supreme court quoted above that the bankruptcy court acquires full jurisdiction over the land in another jurisdiction,⁶⁹ and yet that such a bankruptcy court can not send its process into that other jurisdiction to protect that custody, yet it is judicially settled that both positions are sound.⁷⁰ As was stated by Haight, United States District Judge of New Jersey: "The court may have jurisdiction over the subject-matter, but be powerless to act because it has not obtained jurisdiction over the person."⁷¹

While a bankruptcy court may, upon notice to a person without the territorial limits of the court's jurisdiction, determine the amount of the wrongful prepayment to him, as was done in *Wood v. Henderson* (1907), 210 U. S. 246, 28 Sup. Ct. 621, 52 L. ed. 1046, it leaves the recovery of that amount to be accomplished by an action in a court acquiring jurisdiction of the person in the ordinary way of legal proceedings.⁷²

The bankruptcy court has no right extraterritorially to control the action of parties out of the district who are not claiming the exercise of jurisdiction by the bankruptcy court in the course of the administration of the proceedings, or who have not become parties therein and who can never be brought in unless they voluntarily appear.⁷³

(e) Summary of Cases of Extraterritorial Jurisdiction.

The jurisdiction one court of bankruptcy has over property

⁶⁸ *Acme Harvester Co. v. Beekman Lum. Co.* (1911), 222 U. S. 300, at 311, 56 L. ed. 208.

⁶⁹ *Robertson v. Howard* (1912), 229 U. S. 254, 57 L. ed. 1174; *Thomas v. Woods*, 173 Fed. 585.

⁷⁰ *Roszell Bros. v. Continental Coal Corp.* (1916), 235 Fed. 343, at 351.

⁷¹ *In re Geller* (1914), 216 Fed. 558, at 561.

⁷² *Staunton v. Wooden* (1910), 179 Fed. 61, at 63.

⁷³ *In re J. & M. Schwartz* (1913), 204 Fed. 326, at 329; *In re Isaac Harris Co.* (1909), 173 Fed. 735.

in another jurisdiction may be summed up according to the decisions as follows:

To determine the validity of liens on property even outside of the original bankruptcy court's district.⁷⁴

Make a sale of property lying outside of the district of the original court of bankruptcy when the trustee has obtained title by operation of law.⁷⁵

To re-examine on petition of the trustee in bankruptcy the validity of the payment of money or the transfer of property by the bankrupt made in contemplation of the filing of a petition by or against him in bankruptcy to an attorney or counselor at law, for services to be rendered to him by such an attorney or counselor, and to ascertain and adjudge the extent of the reasonable amount to be allowed for such services, and to direct that the excess may be recovered by the trustee for the benefit of the estate, in the instance where such attorney or counselor at the time of receiving such payment or property and at the time of the proceeding in question was a nonresident of the state or the district.⁷⁶

It was held prior to the United States Supreme Court case of *Acme Harvester Co. v. Beekman Lumber Co.* (1911), 222 U. S. 301, at 311, that the court of original jurisdiction "may authorize its receiver to take possession of property belonging to the estate wherever situated and restrain third parties from interfering with that possession, and may also restrain them from pursuing remedies in other courts which will conflict with the duties of the receiver."⁷⁷

⁷⁴ *In re Muncie Pulp Co.* (1907), 151 Fed. 732; *Galbraith v. Robson-Hilliard Grocery Co.* (1914), 216 Fed. 842; *Thomas v. Woods* (1909), 173 Fed. 585.

⁷⁵ *Robertson v. Howard* (1912), 229 U. S. 254, 57 L. ed. 1174; *In re Granite City Bk.*, 137 Fed. 818; *Thomas v. Woods* (1909), 173 Fed. 585; *T. Z. Wells & Co. v. Sharp* (1913), 208 Fed. 393.

⁷⁶ *In re Wood & Henderson* (1907), 210 U. S. 246, at 249, 28

Sup. Ct. 621, 52 L. ed. 1046. See explanation of *Wood v. Henderson* in *Staunton v. Wooden* (1910), 179 Fed. 61, at 62.

⁷⁷ *In re Dempster* (1909), 172 Fed. 353, at 356. Note: Since that part of the opinion in *In re Dempster* which holds that a court of bankruptcy has no ancillary jurisdiction has been overruled in *Babbitt v. Dutcher*, 216 U. S. 103, it must be noted that even if the statement

§ 329. Ancillary Jurisdiction of Courts of Bankruptcy. In January, 1910, the Supreme Court of the United States⁷⁸ settled the law to be that "the respective district courts of the United States sitting in bankruptcy have ancillary jurisdiction to make orders and issue process in aid of proceedings pending and being administered in the district court of another district," and congress in June of that year enacted an amendment to the Bankruptcy Act of 1898 to the effect that the district courts "are hereby invested within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings in vacation, in chambers and during their respective terms as they are now or may be hereafter held to * * * [20] exercise ancillary jurisdiction over persons or property within their respective territorial limits, in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy."⁷⁹

The amendment of 1910 simply recognized by statute the principles laid down by *Babbitt v. Dutcher* and the practice theretofore pursued by some but not all courts of bankruptcy following the principles of equity and comity.⁸⁰ The right of ancillary jurisdiction is recognized by numerous decisions,⁸¹ although since the amendment of 1910 decisions are superfluous.

§ 330. Time of Taking Effect of Jurisdiction of Courts of Bankruptcy. Immediately upon the filing of the petition in

quoted above is good law we know of no way of a court of bankruptcy extending its process into another district to enforce its orders. See *Acme Harvester Co. v. Beekman Lum. Co.* (1911), 222 U. S. 300, at 311, 56 L. ed. 208.

⁷⁸ In *Babbitt v. Dutcher* (1910), 216 U. S. 102, at 110, 30 Sup. Ct. 372, 54 L. ed. 452, 17 Am. Cas. 969; *Elkus, Petitioner* (1910), 216 U. S. 115, at 117, 30 Sup. Ct. 377, 54 L. ed. 457.

⁷⁹ Quoted in *Fidelity Trust Co. v. Gaskell* (1912), 195 Fed. 865, at 871.

⁸⁰ *Loeser v. Dallas* (1912), 192 Fed. 909, at 911.

⁸¹ *Hartman v. Ackonry* (1914), 210 Fed. 188; *Musica v. Prentice* (1914), 211 Fed. 326, at 327; *In re Lipman* (1912), 201 Fed. 169, at 172; *Robertson v. Howard* (1912), 229 U. S. 254, at 261, 57 L. ed. 1174.

bankruptcy all the assets of the bankrupt come within the jurisdiction and control of the bankrupt court to be applied and disposed of as directed by the Bankruptcy Act for the benefit of the bankrupt's creditors, provided the bankruptcy proceedings should result in an adjudication of bankruptcy.⁸² This is because by the constitution and laws of the United States the bankruptcy courts have been given this jurisdiction in rem.⁸³

Jurisdiction commences upon the filing of a petition for voluntary bankruptcy⁸⁴ or an involuntary bankruptcy petition, because a bankruptcy is a proceeding in rem, and all the world must take notice.

It is as true of the Bankruptcy Law of July 1, 1898, as of the Law of 1867 that the filing of the petition is a caveat to all the world and in effect an attachment and injunction.⁸⁵ The bankrupt's property is within the jurisdiction of the bankruptcy court as soon as the petition is filed, so far as to prevent a state court which subsequently seizes the property from being held to have first obtained exclusive jurisdiction.⁸⁶

While in ordinary equitable proceedings being in personam, the actual seizure of property by one court may take precedence over the constructive seizure of another, nevertheless bankruptcy proceedings are in rem and the filing of the petition is the constructive seizure and equal to actual seizure as far as cutting out all other jurisdictions.

Although upon the filing of the petition in bankruptcy the bankruptcy court takes jurisdiction of the bankrupt's assets, nevertheless pending and prior to the adjudication in bankruptcy, title to the bankrupt's property still remains in him. The court, however, after it has jurisdiction by the filing of

⁸² *Lazarus v. Prentice* (1913), 234 U. S. 263, at 266, 58 L. ed. 1305, 34 Sup. Ct. Rep. 851; *Whittlesey v. Becker & Co.* (1911), 142 App. Div. (N.Y.) 313, at 317, 126 N. Y. S. 1046.

⁸³ *In re Watts & Sachs* (1902), 190 U. S. 1, at 28, 47 L. ed. 933.

⁸⁴ *In re Abrahamson & Bretstein* (1898), 1 A. B. R. 44, at 46; *In re*

Michaelis & Lindeman (1912), 196 Fed. 718, at 719; *In re Zotte* (1911), 186 Fed. 84.

⁸⁵ *Bank v. Sherman*. 101 U. S. 403, 28 L. ed. 866; *Mueller v. Nugent* (1901), 184 U. S. 1, at 14, 45 L. ed. 711.

⁸⁶ *In re Weinger, Bergman & Co.* (1903), 126 Fed. 875, at 876.

the petition, may take custody and control of this property by appointing a marshal or receiver.⁸⁷

APPOINTMENT OF RECEIVER BY COURT OF BANKRUPTCY

§ 331. Distinction between Receiver and Trustee in Bankruptcy. Some of the main distinctions between a receiver and trustee in bankruptcy may be briefly mentioned as follows:

A receiver in bankruptcy is a temporary custodian to preserve the property of the debtor.

A trustee in bankruptcy is a custodian, administrator and a distributor of the property to those entitled.

A receiver has no title to the debtor's property. A trustee gets title by the statute.

A receiver is appointed by the court or the referee acting for the court. A trustee is primarily elected by the creditors, although in default of such election he may be appointed by the referee.

§ 332. Power of Courts of Bankruptcy to Appoint Receivers.

A court of bankruptcy, even without direct statutory authority, has power to appoint a receiver under its equity powers to preserve property pending litigation in such court concerning such property.⁸⁸

Yet the Bankruptcy Act of 1898 specifically invests bankruptcy courts with power to "appoint receivers or marshals upon application of parties in interest in case the courts shall find it absolutely necessary, for the preservation of the estate, to take charge of the property of bankrupts after filing of the petition and until it is dismissed or the trustee is qualified,"⁸⁹ and also to "authorize the business of bankrupts to be conducted for

⁸⁷ Whittlesey v. Becker & Co. (1911), 142 App. Div. (N.Y.) 313, at 317, 126 N. Y. S. 1046.

⁸⁸ In re Fixin & Co., 96 Fed. 748; In re Floerken (1901), 107 Fed. 241, at 242. See Boonville Nat. Bank v. Blakey (1901), 6 A. B. R.

13, where Circuit Judge Jenkins says that "the authority for the appointment of a receiver in bankruptcy proceedings comes from the act and is limited by the act."

⁸⁹ Sec. 2, subdv. 2 of Act of July 1, 1898, ch. 541; 30 Stat. at L. 545.

limited periods by receivers, the marshals, or trustees, if necessary, in the best interest of the estates.”⁹⁰

§ 333. Appointment of Receiver under United States Bankruptcy Act. The United States Bankruptcy Act of 1867 had no provision for the appointment of a receiver in bankruptcy, but under the General Orders in Bankruptcy made by the supreme court in pursuance of the United States Bankruptcy Act of 1867, sec. 10, the justices of the Supreme Court of the United States passed certain general orders which constituted the Rules of Practice and Procedure in Bankruptcy in the District Courts of the United States.

Rule XIII provided among other things: “It shall be the duty of the marshal as messenger to take possession of the property of the bankrupt,” etc.

The law of 1898 provides among other things: The court or referee may “appoint receivers or the marshal, upon the application of parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified.”⁹¹

A further provision which might be construed to give courts of bankruptcy general equity powers and incidentally or inferentially the power to appoint an equitable receiver to preserve property or even to realize property is found in clause 15 of sec. 2 of the Bankruptcy Act of 1898, which is as follows: “make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act.”

There are three general classes of receivers provided for in the Bankruptcy Act of 1898 and its amendments of 1903 and 1910, as follows:

(a) **General receiver**, where he discharges general duties as receiver, not limited to those of a custodian.⁹² Such duties as

⁹⁰ Sec. 2, subdiv. 5, of said U. S. Bankruptcy Act of July 1, 1898.

⁹¹ United States Bankruptcy Act of 1898, sec. 2, subdiv. 3.

⁹² In re Ginsburg (1913), 208 Fed. 160; In re Metropolitan Motor Car Co. (1915), 225 Fed. 274.

general receiver imply some activity, such as collecting assets, making inventories, searches and generally protecting and collecting the assets of the bankrupt. For such services the receiver may receive compensation not limited to that of a mere custodian.⁹³

(b) **Mere custodian**, and where he does not carry on the business of the bankrupt. A mere custodian would be somewhat like a stakeholder and have little or no active duties to perform.⁹⁴ A mere custodian may be given authority to inventory, receive and retain in his possession the assets of the alleged bankrupt, because such inventory is necessary that there be no misunderstanding as to the amount and character of the property.⁹⁵ His compensation is limited to two per cent. on the first thousand dollars and one-half of one per cent. on the excess.

(c) **Receiver to Carry on Business of Bankrupt**. The definition needs little or no explanation,⁹⁶ and additional compensation may be allowed such receiver.⁹⁷

§ 334. Appointment of Official Receiver under English Bankruptcy Act. Under the English Bankruptcy Act we find an official receiver appointed by the board of trade ready to perform the functions performed by the receiver appointed by the court under the United States Bankruptcy Act. The English official receiver has more functions than a receiver under the United States Bankruptcy Act.

“The board of trade [of England] may at any time after the passing of this act, and from time to time, appoint such persons as they think fit to be official receivers of debtor’s estates, and may remove any person so appointed from such office. The official receivers of debtor’s estates shall act under

⁹³ In re Ginsburg (1913), 208 Fed. 160.

⁹⁴ In re Ginsburg (1913), 208 Fed. 160, at 162.

⁹⁵ In re Leonard (1910), 177 Fed. 503, at 506.

⁹⁶ In re Ginsburg (1913), 208 Fed. 160, at 162.

⁹⁷ In re Ginsburg (1913), 208 Fed. 160, at 162; Bankruptcy Act of July 1, 1898, as amended June 25, 1910, sec. 48(e).

the general authority and directions of the board of trade, but shall also be officers of the courts to which they are respectfully attached.”⁹⁸

(a) Interim Receiver upon Presentation of Petition. “The court may, if it is shown to be necessary for the protection of the estate, at any time after the presentation of a bankruptcy petition and before a receiving order is made, appoint the official receiver to be interim receiver of the property of the debtor, or any part thereof, and direct him to take immediate possession thereof or any part thereof.”⁹⁹

The interim receiver in bankruptcy acts as such between the time of the presentation of the petition in bankruptcy and the making of a receiving order on the hearing of the petition.¹

The interim receiver appointed by the English bankruptcy courts corresponds very closely with the receiver appointed by the courts of bankruptcy under the United States act, whereas the official receiver who becomes the final receiver under the English Bankruptcy Act at the hearing of the petition performs a number of functions which are not those of an ordinary equitable receiver and which are not performed by the receiver in bankruptcy under our United States act.

(b) Final Receiver on Hearing of Petition. When upon the hearing of a debtor's petition, the court shall make a “receiving order”² and an “official receiver shall be thereby constituted receiver of the property of the debtor.”³ The status and powers and duties of the official receiver acting as final receiver may be found at length set out in the parts of the English Bankruptcy Act as cited and printed in Vol. II, *infra*, this work.

(c) Powers and Duties of Final Receiver. The official receiver appointed by the English board of trade,⁴ constituted re-

⁹⁸ English Bankruptcy Act of 1883 (46 & 47 Vict. C. 52), S. 66 (1). Provisions for official receiver amplified in English Bankruptcy Act (1914), 70 (1), (2), (3).

⁹⁹ English Bankruptcy Act of 1883 (46 & 47 Vict. C. 52), S. 10 (1). See similar provisions for Interim Receiver in English Bankruptcy Act (1914) 8.

¹ Williams Bankruptcy Practice, pg. 54.

² English Bankruptcy Act of 1883 (46 & 47 Vict. C. 52) S. 9 (1). See English Bankruptcy Act (1914), 7 *et seq.*

³ English Bankruptcy Act of 1883 (46 & 47 Vict. C. 52) S. 9 (1). See English Bankruptcy Act (1914), 7 *et seq.*

⁴ English Bankruptcy Act of 1883 (46 & 47 Vict. C. 66), (1); Act of 1914, 70 (1), (2), (3).

ceiver of the property by a receiving order of the bankruptcy court, and an officer of the appointing court, has the duties: ⁵

First. To assume control over the estate of the debtor.⁶

Second. To take part in the examination of the debtor.⁷

Third. Accept debtor's scheme of composition, hold meeting of creditors, etc., to consider scheme.

Fourth. Perform other duties as prescribed by the Bankruptcy Act.⁸

(d) Trustee Succeeds Receiver. As in the American Bankruptcy Act, so in the English, a trustee in bankruptcy succeeds the receiver and the creditors have the right to appoint a trustee.

"On the appointment of a trustee, the property shall forthwith pass to and vest in the trustee appointed."⁹

Until a trustee is appointed the official receiver shall be the trustee for the purpose of this act, and immediately on a debtor becoming adjudged bankrupt, the property of the bankrupt shall vest in the trustee.¹⁰

The representation of the estate is continuous.¹¹

§ 335. Appointment of Receiver in Bankruptcy Discretionary with Court. The appointment of a receiver in bankruptcy, as the appointment of a receiver by an ordinary court of equity, is a matter resting within the discretion of the bankruptcy court.¹²

§ 336. Consent of Bankrupt Will Not Authorize Appointment. "The Bankruptcy Act makes no provision for the appointment of a receiver in bankruptcy by the consent of the alleged bankrupt. The appointment by the terms of the act is only authorized when it is absolutely necessary for the preser-

⁵ English Bankruptcy Act of 1883 (46 & 47 Vict. C. 52) S. 9 (1). See English Bankruptcy Act (1914), 10 et seq.; also, ch. XXXVI, Vol. II, *infra*.

⁶ English Bankruptcy Act of 1883 (46 & 47 Vict. C. 52) S. 9 (1). See English Bankruptcy Act (1914), 10 et seq.; also, ch. XXXVI, Vol. II, *infra*.

⁷ English Bankruptcy Act of 1883 (46 & 47 Vict. C. 52), S. 17 (5). See English Bankruptcy Act (1914), 10 et seq.; also, ch. XXXVI, Vol. II,

⁸ English Bankruptcy Act of 1883 (46 & 47 Vict. C. 52), S. 68, 69, 70 See English Bankruptcy Act (1914), 10 et seq.; also, ch. XXXVI, Vol. II, *infra*.

⁹ English Bankruptcy Act of 1883 (46 & 47 Vict. C. 52), 72 (1), et seq. See English Bankruptcy Act (1914), 76 et seq.

¹⁰ English Bankruptcy Act of 1883 (46 & 47 Vict. C. 52), 86 (4); English Bankruptcy Act (1914), 78 (4).

¹¹ *In re Hallett & Co.*, 10 Mor. 250.

vation of the estate. The involuntary petition is filed on the theory that the alleged bankrupt is insolvent; that he has creditors to whom his estate is to be distributed. If this be not true, there is no reason for the appointment of a receiver or for the adjudication. The creditors, therefore, are the parties chiefly interested in awarding the expenses of an unnecessary receivership. It was not intended, we think, that the bankrupt by his consent could remove the limitations of the statute and authorize the appointment of a receiver where it was not necessary for the preservation of the estate. Provisions of the act for the protection of the bankrupt can not be waived by him if such provisions also serve to protect the bankrupt's creditors."¹³

§ 337. Receiver in Bankruptcy Statutory with Equitable Powers. A receiver appointed under the United States Bankruptcy Act of July 1, 1898, is not a general receiver, as designated by the courts in chancery, but he is a statutory receiver clothed with limited powers, and he can not by the very terms of the statute go beyond the respective powers conferred upon him by the statute itself.¹⁴

Nevertheless the court of bankruptcy is ordinarily a court of equity and a United States¹⁵ district court sitting in bankruptcy, whether it is exercising its primary or its ancillary jurisdiction, is a court of equity,¹⁶ and congress has given to the bankruptcy courts full and complete equitable power in the matter of the administration of the estates of bankrupts.¹⁷

It therefore follows that courts of bankruptcy have such powers in the appointment of receivers and in the holding and administration of estates in the control the courts of bankruptcy

¹³ T. S. Faulk & Co. v. Steiner, Lobman & Frank (1908), 165 Fed. 861, at 869.

¹⁴ In re Harris (1907), 156 Fed. 875, at 876; Boonville Nat. Bk. v. Blakey (1901), 107 Fed. 891, at 894; T. S. Faulk & Co. v. Steiner, Lobman & Frank (1908), 165 Fed. 861, at 867.

¹⁵ Le Master v. Spencer (1913), 203 Fed. 210, at 216.

¹⁶ In re Isaacson (1909), 175 Fed. 292, at 293; In re Clark Coal & C. Co. (1909), 173 Fed. 658, at 663.

¹⁷ Robinson v. Howard (1912), 229 U. S. 254, at 263, 57 L. ed. 1174

through receivers as ordinary equity courts have, provided such bankruptcy courts act within the provisions of the Bankruptcy Act.

§ 338. Time when Receiver in Bankruptcy Appointed.

Since courts of bankruptcy have general equity powers, they may appoint a receiver for the temporary care and custody of the estate of the alleged bankrupt, when such action by the court is necessary to protect the property.¹⁸ Such appointment may be made at any time after the filing of the petition and until it is dismissed or the trustee is qualified.¹⁹

§ 339. Grounds for Appointment of Receiver in Bankruptcy.

"The property of a bankrupt should not be taken out of his control and placed in the hands of a receiver before adjudication unless it clearly appears either that the property is perishable, or that it is apt to become wasted, despoiled or misappropriated by him or those who have it in their custody or control."²⁰ This is peculiarly so in the case of involuntary proceedings in bankruptcy, in which case receivers should never be appointed without full compliance with all the requirements of the Bankruptcy Act, including a showing of cause.²¹

The power to appoint receivers in bankruptcy should be exercised not as a matter of course, but cautiously, circumspectly, and always upon proof that the appointment is absolutely necessary.²²

¹⁸ *Lansing v. Manton* (1876), Fed. Cas. 8077, 14 N. B. R. 127. Under old Bankruptcy Act; In re Florecken (1901), 107 Fed. 241, at 242; In re Fixen & Co., 96 Fed. 748; In re Rosenthale (1906), 144 Fed. 548, 549, it is intimated that the power to appoint comes only from the statute. However, the authorities first quoted indicate that courts of bankruptcy have inherent power without statute to appoint. The statute merely restricts the power to when "absolutely necessary."

¹⁹ Section 2, subdiv. 3, of the Act of July 1, 1898, ch. 541, 30 Stat. at L. 545.

²⁰ In re Standard Cordage Co. (1910), 184 Fed. 156, at 158.

²¹ *Badder's Clothing Co. v. Burnham-Munger-Root D. G. Co.* (1915), 228 Fed. 470, at 475; *T. S. Faulk & Co. v. Steiner, Lobman & Frank* (1908), 165 Fed. 861, at 867.

²² In re T. E. Hill Co. (1907), 159 Fed. 73, at 76; In re De Lancey Stable Co. (1909), 170 Fed. 860, at 862; In re Desroches (1911), 183 Fed. 991, at 998; In re Oakland

Says Coxe, J., speaking for the United States Circuit Court of Appeals for the Second Circuit, December 14, 1909: "The direct grant of authority for the appointment of receivers is found in sec. 2, subdiv. 3, of the act [Act July 1, 1898, ch. 541, 30 Stat. 545 (U. S. Comp. Stat. 1901, p. 3421)], and is as follows: Courts of bankruptcy are invested with jurisdiction to 'appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of the estates, to take charge of the property of bankrupts after filing of the petition and until it is dismissed or the trustee is qualified.'

"The power to take from a man his property, without giving him an opportunity to be heard, is both arbitrary and drastic, and should not be exercised except in the clearest cases. Congress recognized the necessity for caution by limiting the appointment of receivers to cases where it is 'absolutely necessary' for the preservation of the estate. In other words, the reason for such an interference with the rights of property must be clear, positive and certain. Of course cases frequently arise where this remedy may be necessary—cases where there is reason to believe that the property may be stolen or secreted or turned over to favored creditors. But fraud can not be presumed, neither can danger to the property be predicated of acts which are honest and lawful.'" ²³

If property of the alleged bankrupt is already in the hands of a state court receiver, there should be some showing of serious danger to the assets or some good grounds shown to take the property at once out of the hands of the state receiver.²⁴ Likewise if the property is in the hands of an assignee under state laws who presumably would do his duty.²⁵

Lumber Co. (1909), 174 Fed. 634, at 637; In re Rosenthal (1906), 144 Fed. 548, at 549; Bryan v. Bernheimer (1900), 181 U. S. 188, at 195, 45 L. ed. 814; Bardes v. Hawarden Bank, 178 U. S. 524, at 538, 44 L. ed. 1175; T. S. Faulk & Co. v. Steiner, Lobman & Frank (1908), 165 Fed. 861, at 867.

²³ In re Oakland Lumber Co. (1909), 174 Fed. 634, at 636; quoted in In re Standard Cordage Co. (1910), 184 Fed. 156, at 158.

²⁴ Ingram v. Ingram Dart Lighterage Co. (1915), 226 Fed. 58, at 59.

²⁵ In re Wentworth Lunch Co. (1911), 191 Fed. 821, at 822;

§ 340. Purpose of Appointment of Receiver in Bankruptcy.

The purpose of the appointment of a receiver in bankruptcy is one of mere temporary custody of the property²⁶ until a trustee may be elected or appointed or until the property may be disposed of by some order of court.

Said Mr. Justice Miller, concerning the purposes for which a marshal may take possession of the property of a bankrupt (and the same purpose is effected by the taking of the property by a receiver) :

“The act of congress was designed to secure the possession of the property of the bankrupt so that it might be administered under the proceedings in the bankrupt court. Between the first step initiating proceedings in the bankrupt court and the appointment of the assignee (now trustee), a considerable time often passes. During that time the property of the bankrupt, especially in a case commenced by creditors, may be surreptitiously conveyed beyond the reach of the court or of the assignee (now trustee), to whose possession it should come when appointed. If the bankrupt does not voluntarily aid the court, or is inclined to defeat the proceedings, he can, with the aid of friends or irresponsible persons, sell his movable property and put the money in his pocket, or secrete his goods or remove them beyond the reach of his assignee (now trustee) or the process of the court, and defy the law. The evidence in this case shows the manner in which this can be done. It was the purpose of the act of congress to prevent this evil.”²⁷

The receiver should not perform the administrative duties of a trustee in bankruptcy. The management of the estate, before the election or appointment of a trustee, differs in important respects from the management thereafter. Under an involuntary petition, in particular, the receiver's duty is often

²⁶ *In re T. L. Kelly Dry Goods Co.* (1900), 102 Fed. 747, at 750, 4 A. B. R. 528. See *In re Francis, et al.* (1905), 14 A. B. R. 676, at 678; *In re T. E. Hill Co.* (1907), 159 Fed. 73, at 76.

²⁷ *Sharpe v. Doyle* (1880), 102 U. S. 686, at 689, 26 L. ed. 277; quoted in *Bryan v. Bernheimer* (1900), 181 U. S. 188, at 195, 45 L. ed. 814. See *Ferbelman v. Packard*, 109 U. S. 421, 27 L. ed. 634.

to maintain, as far as possible, the continuity of the respondent's affairs so that, if no adjudication is made, his property and business may be redelivered to him damaged as little as possible by the proceedings in bankruptcy.²⁸

The Bankruptcy Act provides for three distinct purposes in the appointment of a receiver in bankruptcy:²⁹ (1) To act as general receiver; (2) To act as mere custodian; (3) To carry on business of bankrupt.

§ 341. Property over Which Receiver in Bankruptcy Appointed. A receiver in bankruptcy is entitled to take custody of whatever is plainly the property of the bankrupt and against which no third party makes any claim with color of title.³⁰

A court of bankruptcy has no power by summary order to divest a third party of any title (even a fraudulent one) asserted by him against the bankrupt or his trustee. But this does not mean that the court can not enter a summary order where the only title set up rests, not upon any matter of fact, but upon a statement of law only.³¹

The court of bankruptcy has authority in a summary proceeding to order the property of the bankrupt in the possession of a bailee or agent to be delivered into the custody of the receiver pending the appointment of a trustee.³²

§ 342. Vacation and Discharge of Receiver in Bankruptcy Discretionary with Court. As the court of bankruptcy has discretion to appoint a receiver acting in accordance with the usages of equity and the statutes therein providing, so a court of bankruptcy has power at his discretion to vacate the receivership and discharge the receiver upon proper grounds.³³

²⁸ In re Richards (1903), 127 Fed. 772.

²⁹ See sec. 333, supra.

³⁰ In re Michaelis & Linderman (1912), 196 Fed. 718, at 719, 27 A. B. R. 299; see sec. 328, supra.

³¹ In re Michaelis & Linderman (1912), 196 Fed. 718, at 719.

³² In re Muncie Pulp Co. (1905), 139 Fed. 549. See Sharp v. Doyie (1880), 102 U. S. 686, 26 L. ed. 277; Ferbelman v. Packard (1883), 109 U. S. 421, 27 L. ed. 634.

³³ In re Church Const. Co. (1907), 157 Fed. 298; In re Ward (1911), 194 Fed. 179.

If a receiver in bankruptcy has been improperly appointed, such appointment not being absolutely necessary for the preservation of the estate or for other cause shown, the receivership may be vacated.³⁴ Yet this may not mean the dismissal of the petition to have the defendant adjudged a bankrupt.³⁵

§ 343. Appointment of Ancillary Receiver in Bankruptcy.

The Bankruptcy Act of 1878, which defines courts of bankruptcy and their jurisdiction "within their respective territorial limits," contains nothing which authorizes such a court to confer upon a receiver appointed thereunder, who is not vested with the title to the bankrupt's property, the power to exercise his official function in respect to such property in any other district, and under the general rule governing courts of equity and their receivers appointed in creditors' suits, such receiver has no authority to act officially outside the district of his appointment.³⁶

Ancillary jurisdiction by courts of bankruptcy in different jurisdictions was not originally expressly provided for by the Act of 1898, and yet it was held that, "If it was necessary to effectuate the purposes of the act to impose a status on the property of a bankrupt without regard to territorial limits, it is equally in line with the legislative purpose to maintain such federal control to the end that all the assets, wherever situated, may remain intact until the trustee is invested with title thereto, and an ancillary receiver may be appointed to aid the court of original jurisdiction."³⁷

In January, 1910, the Supreme Court of the United States³⁸ settled the law to be, even under the Act of 1898, before it was

³⁴ In re Standard Cordage Co. (1910), 184 Fed. 156.

³⁵ In re Standard Cordage Co. (1910), 184 Fed. 156.

³⁶ In re Benedict (1905), 140 Fed. 55.

³⁷ In re Benedict (1905), 140 Fed. 55, at 60. Contra, In re Schram (D. C.), 97 Fed. 760; In re Williams (D. C.), 123 Fed. 322;

In re Tybo-Mining Co. (D. C.), 132 Fed. 699; In re Williams (D. C.), 120 Fed. 38; Ross-Mehan Co. v. So., 124 Fed. 403.

³⁸ Babbitt v. Dutcher (1910), 216 U. S. 102, at 110, 30 Sup. Ct. 372, 54 L. ed. 402, 17 Am. Cas. 969; Elkus, Petitioner (1910), 216 U. S. 115, at 117, 30 Sup. Ct. 377, 54 L. ed. 457.

amended, that "the respective district courts of the United States sitting in bankruptcy have ancillary jurisdiction to make orders and issue process in aid of proceedings pending and being administered in the district courts of another district."

The Bankruptcy Act of 1898 was amended in 1903, 1906, 1910. On June 25, 1910, was added to sec. 2 as follows: "Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy."

By this amendment the bankruptcy courts were specifically given ancillary jurisdiction over persons or property within their respective territorial limits in aid of a trustee or receiver appointed in any other court of bankruptcy.³⁹

APPOINTMENT OF RECEIVER BY REFEREE IN BANKRUPTCY

§ 344. Appointment of Receiver in Bankruptcy by Referee—Generally. Ordinarily the district judge, upon a proper presentation of evidence in the form of testimony or affidavits, appoints a receiver in proper cases. Yet the absence of the district judge vests jurisdiction of the petition in bankruptcy and of the application for a receiver and other duties in the referee,⁴⁰ and such referee has power to appoint a receiver.⁴¹

The Bankruptcy Act of July 1, 1898, sec. 30, ch. 541, 30 Stat. 554 (U. S. Comp. Stat. 1901, p. 3434) provided as follows: "Sec. 30. Rules, Forms and Orders.—(a) All necessary rules, forms and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time by the Supreme Court of the United States."

The Supreme Court of the United States, October term, 1898, issued Order No. XXIII, which is as follows:

³⁹ *Lazarus v. Prentice* (1913), 234 U. S. 263, at 267, 58 L. ed. 1305.

⁴⁰ Bankruptcy Act, July 1, 1898, sec. 38.

⁴¹ *In re T. L. Kelly Dry Goods Co.* (1900), 102 Fed. 746, at 749.

“XXIII.—ORDERS OF REFEREE

“In all orders made by a referee, it shall be recited, according as the fact may be, that notice was given and the manner thereof; or that the order was made by consent, or that no adverse interest was represented at the hearing, or that the order was made after hearing adverse interests.”

This order should be followed by the referee when he appoints a receiver. If notice has not been given, it should be clearly shown why the appointment was absolutely necessary without notice.⁴²

It has been held that in accordance with General Order No. XII of the General Orders in Bankruptcy⁴³ that “the phraseology forthwith be sent by mail to the referee” include delivery as well as mailing so that, whether the copy of the order of reference be sent by mail or delivered personally, the jurisdiction of the referee attaches only for the time of its receipt by him.⁴⁴ If a receiver is appointed by a referee before the order of reference or before the proper certificate of absence of the judge⁴⁵ was delivered to the referee, the appointment may be vacated.⁴⁶

§ 345. Appointment of Receiver in Bankruptcy by Referee—Before Reference. The referee has not a case before him until the case has been referred by the court or when in the absence of the court the reference is made, as a matter of course by the clerk of the court⁴⁷ or deputy clerk.⁴⁸ In such a case “referees respectively are hereby invested * * * with jurisdiction to * * * (3) exercise the power of the judge for the taking possession of and releasing of property of the bankrupt

⁴² T. S. Faulk & Co. v. Steiner, Lobman & Frank (1908), 165 Fed. 861, at 866.

⁴³ 32 C. C. A. xvi; 89 Fed. vii.

⁴⁴ In re Floerken (1901), 107 Fed. 241, at 243.

⁴⁵ United States Bankruptcy Act of 1898, sec. 38, subdiv. 3.

⁴⁶ In re Floerken (1901), 107 Fed. 241, at 243.

⁴⁷ Bankruptcy Act, secs. 18f, 18g and 38.

⁴⁸ Gilbertson v. United States (1909), 168 Fed. 672, at 673.

in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness or inability to act.”⁴⁹

Such powers granted to the referee include power to appoint a receiver of the bankrupt's property.⁵⁰

§ 346. Appointment of Receiver in Bankruptcy by Referee—Before Adjudication. A bankruptcy court has power to appoint a receiver of the alleged bankrupt's property in order to preserve the property⁵¹ at any stage of the proceeding after filing of the petition and until it is dismissed or the trustee qualified. Sec. 2, subsec. 3, of Act of 1898. Under sec. 38 on the subject of “Jurisdiction of Referees,” (a) “Referees respectively are hereby invested, subject always to a review by the judge within the limits of their districts as established from time to time, with jurisdiction to” * * * (4) “perform such part of the duties, except as to questions arising out of the application of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided.”

Such an appointment it would seem can be made by the referee before adjudication,⁵² but not before a reference to the referee unless without reference the referee has power to “exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness or inability to act.”⁵³

⁴⁹ United States Bankruptcy Act of 1898, sec. 38, subdiv. 3.

⁵⁰ See *In re T. L. Kelly Dry Goods Co* (1909), 102 Fed. 747, at 749; also, *In re Florecken* (1901), 107 Fed. 241, at 242; *McAffee v. Arnold & Mathis* (1908), 155 Ala. 561, 46 So. 870.

⁵¹ *In re Florecken* (1901), 107

Fed. 241, at 242; *In re Fixen* (D. C.), 96 Fed. 748.

⁵² Reference to a referee is seldom made before adjudication, but it may happen, as in *In re Ruos* (1908), 164 Fed. 749 (D. C. Pa.), 21 A. B. R. 257.

⁵³ United States Bankruptcy Act of 1898, sec. 38, subdiv. 4.

§ 347. Appointment of Receiver in Bankruptcy by Referee—After Reference. As stated above,⁵⁴ a referee can not act until the case has been referred to him by the court order or by the clerk issuing a certificate. After such reference the referee may appoint a receiver.⁵⁵ There is no prohibition in the Bankruptcy Act against the bankruptcy court appointing a receiver of the property even after a reference, but General Orders in Bankruptcy promulgated by the Supreme Court of the United States, October, 1898, Order No. XII, provides as follows:

“XII.—DUTIES OF REFEREE

“1. The order referring a case to a referee shall name a day upon which the bankrupt shall attend before the referee; and from that day the bankrupt shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court. A copy of the order shall forthwith be sent by mail to the referee, or be delivered to him personally by the clerk or other officer of the court. And thereafter all proceedings, except such as are required by the act or by these general orders to be had before the judge, shall be had before the referee.

“2. The time when and the place where the referees shall act upon the matters arising under the several cases referred to them shall be fixed by special order of the judge or by the referee; and at such times and places the referees may perform the duties which they are empowered by the act to perform.

“3. Application for a discharge or for the approval of a composition for an injunction to stay proceedings of a court or officer of the United States or of a State shall be heard and decided by the judge. But he may refer such an application

⁵⁴ See secs. 345 and 346, *supra*; In re Florecken (1901), 107 Fed. 241, at 242.

⁵⁵ In re Florecken (1901), 107 Fed. 241, at 242.

or any specified issue arising thereon to the referee to ascertain and report the facts.”

§ 348. Appointment of Receiver in Bankruptcy by Referee—After Adjudication. The bankruptcy court, with few exceptions,⁵⁶ will not refer a case to a referee until after adjudication of bankruptcy. A referee can not appoint a receiver until he has been given jurisdiction of the case by order of reference by the court or order of reference as of course by the clerk of the court.⁵⁷ It therefore follows that a receiver is not generally appointed by the referee until after adjudication.

Section 1, subdiv. 2, of the Bankruptcy Act of 1898, is as follows: “Adjudication shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed.”

This statute has been construed to mean “that if there is no appeal from the decree adjudicating the defendant a bankrupt, it dates from the rendition of the same, and if there is an appeal and it is finally confirmed, the adjudication shall date from the confirmation. However, the mere taking an appeal and dismissal of the same, either by the appellant in the appellate court is not a final confirmation so as to change the date of the adjudication from the time it is made to the dismissal of the appeal.”⁵⁸

McPherson, J., of the Eastern District of Pennsylvania, 1909,⁵⁹ held that a dismissal results as an affirmance of the adjudication in bankruptcy and the adjudication then dates from such dismissal.⁶⁰

⁵⁶ *In re Ruos* (1908), 164 Fed. 749 (D. C. Pa.), 21 A. B. R. 257.

⁵⁷ See sec. 344.

⁵⁸ *Moore Bros., et al., v. Cowan* (1911), 173 Ala. 536, at 544, 55 So. 903.

⁵⁹ *In re Lee* (1909), 171 Fed. 266, at 268.

⁶⁰ We fail to agree with Judge McPherson for the reasons stated in *Moore Bros., et al., v. Cowan* (Note 58), and for the further reason that such a construction would place the fixing of the date of adjudication not in the court's power, but in the power of the appellant who dismisses.

PRACTICE AND PROCEDURE IN APPOINTMENT OF RECEIVER IN BANKRUPTCY

§ 349. **Petition for Appointment of Receiver in Bankruptcy.**

The authority to appoint a receiver in bankruptcy is conferred by the Bankruptcy Act and the steps laid down therein must be followed. The act authorizes the appointment of receivers "upon the application of parties in interest in case the court shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until dismissed or the trustee is qualified." Act of July 1, 1898, ch. 541, sec. 2 (3), 30 Stat. 545 (U. S. Comp. Stat. 1901, p. 3421).

The petition to appoint the receiver should allege that the appointment is absolutely necessary for the preservation of the estate and the facts should be stated either in the sworn petition or in accompanying affidavits showing the necessity.⁶¹

§ 350. **Receiver in Bankruptcy on Court's Own Motion.**

The bankruptcy court has power and it is its duty in a proper case on its own motion to take custody of the property of the alleged bankrupt at any time after the filing of the petition. The filing of the petition gives the bankruptcy court jurisdiction; some action by the court, however, such as an order appointing a receiver and ordering him to take possession, or ordering the marshal to do so, is necessary to give the court custody of the property. There is a distinction between jurisdiction and custody of property.⁶²

§ 351. **Notice of Appointment of Receiver in Bankruptcy.**

The United States Bankruptcy Act does not expressly provide that notice shall be given before the appointment of a receiver shall be made,⁶³ but it is a general rule that, from the institu-

⁶¹ T. S. Faulk & Co. v. Steiner, Lobman & Frank (1908), 165 Fed. 861, at 867.

⁶² In re Abrahamson & Bretstein (1898), 1 A. B. R. 44, at 46.

⁶³ Latimer, et al., v. McNeal (1906), 142 Fed. 451, at 452.

tion of a suit until final judgment, every step that immediately affects the rights of a defendant should be preceded by notice, and with a few and well-defined exceptions, no court is justified in appointing a receiver and seizing the property of a defendant without giving him notice and an opportunity to be heard. It is necessary to fairness and justice in all legal procedure that judicial actions should be taken in open court on issue between the parties, or after an opportunity for such issue.⁶⁴

“Under the well-established rule a chancellor will not appoint a receiver without notice except in a case of imperious necessity, when the rights of the petitioner can be secured and protected in no other way. It sometimes becomes necessary for the court to act without notice to the defendant, when he has absconded in or beyond the jurisdiction of the court, or can not be found, or when there is imminent danger of irreparable injury, or when, by giving notice, the very purpose of the appointment may be rendered nugatory.”⁶⁵

If the appointment of a receiver in bankruptcy is asked for when the property of the debtor in bankruptcy is already in the custody of a state court through its receiver, then notice of the request for a receiver should be given to the state court receiver, in view of the fact that the receiver in bankruptcy when appointed is entitled to supersede the possession of the receiver in the state court⁶⁶ under certain circumstances.

Notice of the application for appointment may be dispensed with under certain conditions: (1) Where the defendants or parties in interest have absconded or are beyond the jurisdiction of the court or can not be found. (2) Where there is imminent danger of loss or great damage or irreparable loss or injury, or the gravest emergency, or when by giving notice the preservation of the property may be interfered with,⁶⁷ as

⁶⁴ T. S. Faulk & Co. v. Steiner, etc. (1908), 165 Fed. 866; Hutchinson v. American Palace Car Co., 104 Fed. 182, at 185.

⁶⁵ T. S. Faulk & Co. v. Steiner, etc. (1908), 165 Fed. 861.

⁶⁶ Sidney L. Bauman Diamond Co. v. Hart (1911), 192 Fed. 498, at 503.

⁶⁷ Latimer, et al., v. McNeal (1906), 142 Fed. 451, at 452.

where the property may be removed from the jurisdiction of the court, or the proceeds of the same wrongfully appropriated.⁶⁸

The failure to issue a notice to bankrupts who had been engaged in procuring money through the mails by fraudulent representations and who were in the custody of the United States authorities, was held not to deprive the bankrupts of their property without due process of law.⁶⁹ Such an action by the court was merely a preliminary step in a proceeding whereby property is taken into custody and safely preserved until the rights of the contending parties could be determined.⁷⁰ It is not depriving a person of his property without due process of law.⁷¹

§ 352. Bond of Petitioning Creditors before Appointment.

The Bankruptcy Act of 1898, sec. 2, subdiv. e, and sec. 69 provide for bonds being given by petitioning creditors. The purpose of these two sections is to require indemnity to be given to the alleged bankrupt before his property shall be seized or taken from his possession in behalf of the petitioning creditor or creditors before there has been an adjudication of bankruptcy.⁷² An order of appointment of a receiver before adjudication should fix a time within which a bond should be filed by the petitioning creditors and that the receiver should not take possession until the bond is filed.⁷³

When petitioning creditors apparently show that the only assets of the alleged bankrupt are directly involved in a foreclosure suit, such petitioning creditors may be required to give a bond if they wish a receiver appointed and include as one of the conditions of the bond that they will pay the expenses of

⁶⁸ *In re Francis, et al.* (1905), 14 A. B. R. 676, at 678.

⁶⁹ *In re Francis, et al.* (1905), 14 A. B. R. 676, at 679, 136 Fed. 974.

⁷⁰ *In re Francis, et al.* (1905), 14 A. B. R. 676, at 679, 136 Fed. 974; *Latimer, et al., v. McNeal* (1906), 142 Fed. 451, at 452.

⁷¹ *Latimer, et al., v. McNeal* (1906), 142 Fed. 451, at 452; *In re Francis, et al.* (1905), 136 Fed. 974, 14 A. B. R. 676, at 679.

⁷² *Matter of Haff* (1905), 13 A. B. R. 354, at 356.

⁷³ *Matter of Haff* (1905), 13 A. B. R. 354, at 357.

the receivership if insufficient assets applicable to that purpose are not discovered.⁷⁴

§ 353. Bond of Bankrupt for Release of Property. Section 69 of the United States Bankruptcy Act of July 1, 1898, provides for the seizure of the property of an alleged bankrupt against whom an involuntary petition in bankruptcy has been filed. The court may, upon satisfactory proof by affidavit, issue a warrant to the marshal or receiver to seize the property under the circumstances indicated in the statute. Before such warrant is issued the petitioners applying therefor must file a bond.

“Such property shall be released if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.”⁷⁵

§ 354. Who Eligible for Appointment as Receiver. The court is responsible for the appointment of a receiver in bankruptcy. It often becomes the duty of the receiver directly to antagonize the bankrupt by efforts to discover secreted assets and in other ways. Therefore there should not be any suspicion of partiality or sense of obligation on the part of the receiver toward the bankrupt.⁷⁶ It therefore follows that if there is collusion between the proposed receiver and the bankrupt, and an attempt is made by the bankrupt to illegally control the receiver after appointed, such a person should not be appointed.⁷⁷

Where it was alleged and proved to the court that the receiver proposed to two attorneys that all the fees of the receiver and of the attorneys should be divided into three parts and

⁷⁴ *In re McKane, et al.* (1907), 152 Fed. 733, at 734.

⁷⁵ United States Bankruptcy Act of July 1, 1898, sec. 69.

⁷⁶ *Birmingham Coal & Iron Co. v. Southern Steel Co.* (1908), 160 Fed. 212, at 215.

⁷⁷ *Birmingham Coal & Iron Co. v. Southern Steel Co.* (1908), 160 Fed. 212, at 214.

shared equally between them, such acts were held to be illegal and unprofessional, and the order appointing the receiver was vacated and a new receiver appointed.⁷⁸

§ 355. Who Eligible for Attorney for Receiver. Said Lacombe, J., speaking for the United States Circuit Court of Appeals for the Second District, in 1908: "It would have been well had congress in the Bankruptcy Act prohibited receivers from selecting as attorneys or counsel lawyers who had appeared for either the bankrupt or the petitioning creditor. Such selection affords a ready opportunity for chicanery, fraud and perjury, and it would seem desirable for bankruptcy courts generally to adopt the wholesome rule in force in the Southern District of New York forbidding such selection, and to enforce such rule rigidly."⁷⁹

"On the other hand," said Ray, D. J., United States District Court, Northern Division, of New York, "the policy of this court is and always has been to allow receivers and trustees to employ their own attorneys and assume responsibility for their acts. This court would not hesitate to direct receivers to dismiss attorneys employed by them and employ others, should it appear that the attorneys employed are incompetent or acting in the interest of one creditor or set of creditors as against others, and not for the good of all, or to serve some purpose of their own in any way antagonistic and detrimental to the interests of the general creditors."⁸⁰

§ 356. Procedure for Seizure of Property by Receiver. See sec. 405, et seq., under "Suits in Bankruptcy Proceedings."

§ 357. Surrender of Property by Bankrupt. It is the duty of the bankrupt to surrender his property to the receiver in bankruptcy; this includes his books and papers. He can not

⁷⁸ In re Oshwitz, et al. (1910), 183 Fed. 990, at 991.

⁷⁹ In re Strobel (1908), 160 Fed. 916, at 917.

⁸⁰ In re Champion Wagon Co. (1912), 193 Fed. 1004.

withhold these books and papers on his mere assertion that they tend to incriminate him, but he must produce them before the court or referee in bankruptcy in order to have the question determined whether they do in fact tend to incriminate him, and if it appears that they do contain incriminating evidence, the court can make such an order as will protect the bankrupt from the use of such evidence for any criminal proceeding and at the same time will enable the trustee or receiver to make use of the books as may be necessary.⁸¹

§ 358. Collateral Attack on Appointment of Receiver in Bankruptcy. A decree made by a court of bankruptcy having jurisdiction of the necessary parties and of the subject-matter can not be collaterally attacked. If a United States bankruptcy court orders a receiver to bring a plenary suit in another court, and the receiver in bankruptcy does so, the right of the receiver in bankruptcy to bring suit can not be attacked in the plenary suit.⁸² In a replevin suit brought against a receiver in bankruptcy the plaintiff can not attack collaterally the official status of the receiver or the regularity of the proceedings leading up to his appointment.⁸³

The federal court has exclusive jurisdiction to adjudge a person a bankrupt and to appoint a receiver, and if either order is irregular, improvident or unauthorized, it should be corrected or questioned in that forum and not in the state courts upon collateral attack.⁸⁴

Whether a receiver in bankruptcy should be appointed of a corporation, on the filing of an involuntary petition in bankruptcy against such a corporation, and whether such a receiver should have power to borrow money, are questions directed to the discretion of the judge of the district or bankruptcy court.

⁸¹ *In re Harris* (1908), 164 Fed. 292; *In re Hess* (D. C.), 14 A. B. R. 559, 134 Fed. 109; *In re Hark Bros.* (D. C.), 14 A. B. R. 624, 136 Fed. 986.

⁸² *Slaughter v. Railroad* (1911), 125 Tenn. 292, at 293, 143 S. W. 603.

⁸³ *Ross v. Stroh* (1908), 165 Fed. 628, at 630.

⁸⁴ *Moore Bros., et al., v. Cowan* (1911), 173 Ala. 536, at 545, 55 So. 903; *Turner v. Hudson*, 105 Me. 476, 75 Atl. 45; *White v. Davis* (1910), 134 Ga. 274, 67 S. E. 717, at 721.

Questions of this character can not be revised by an upper court on a writ of mandamus; they must come up through the regular channels of appeal and error.⁸⁵

§ 359. Collateral Attack on Appointment of Receiver by State Court. If a state court is one of general jurisdiction and the property and the parties in interest were within its judicial limits and control, and if under the proper conditions such state court had the right and power to appoint a receiver, then the determination by such a court of the question whether the bill then filed presented such equity as warranted the exercise of its admitted power to appoint a receiver was a judicial act such as could be, if not revoked by the court itself, only reversed by appeal to the proper appellate court, and until so reversed can not be questioned collaterally by a federal court of bankruptcy or by any other court.⁸⁶

§ 360. Extension of Receivership in Bankruptcy. When it can be shown that there is property which ought to be held by the receiver and which in fact does belong to the estate of the bankrupt, an order may be made by the court extending the receivership to that property.⁸⁷

§ 361. Motion to Discharge Receiver. See sec. 342, et seq.

§ 362. Motion to Vacate Receivership. See sec. 342, et seq.

§ 363. Kinds of Review under Bankruptcy Act. Review of the orders, judgments and proceedings, etc., of the courts of bankruptcy of the United States may be had in several different manners:

(a) **An appeal** may lie as provided for in secs. 24a and 25a, 25b and 25c.

⁸⁵ *Edinburg Coal Co. v. Humphreys*, Judge (1905), 134 Fed. 839, at 840.

⁸⁶ *In re Benwood Brewing Co.* (1913), 202 Fed. 326, at 327.

⁸⁷ *In re Rieger, Kapner & Altmark* (1907), 157 Fed. 609, at 616.

(b) **Writ of Error May Lie.** See sec. 25c.

(c) **"Superintend and revise,** in matters of law the proceedings of the several inferior courts of bankruptcy within the jurisdiction," is provided for by sec. 24b.⁸⁸

(d) **Certiorari** is provided for by sec. 25d, and by Act of January 28, 1915, ch. 22, sec. 4, as amended September 6, 1916, ch. 448, sec. 3, 38 Stat. 804. This amendment will be found at the end of the Bankruptcy Act of July 1, 1898, as printed in Vol. II of this work at page —.

§ 364. Review under Bankruptcy Act by Sections. Under the Bankruptcy Act of 1867 and decisions thereunder, it was held that appeals do not lie from the decisions of the United States circuit courts in the exercise of their supervisory jurisdiction under the Bankruptcy Law.⁸⁹

Says Mr. Chief Justice Waite:⁹⁰ "The principle upon which these decisions rests is, that a proceeding in bankruptcy, from its commencement to its close upon the final settlement of the estate, is but one suit. The several motions made and acts done in the bankruptcy court in the progress of the cause are not distinct suits at law or in equity, but parts of one suit in bankruptcy, from which they can not be separated. As our jurisdiction extends only to a re-examination of final judgments or decrees in suits at law or in equity, it follows that we have no control over judgments and orders made by courts in mere bankruptcy proceedings."

(a) **Section 4, Act of Sept. 6, 1916.** The provisions of the Act of 1898 and amendments of 1903 and 1910 do not substantially change⁹¹ the ruling in *Wiswall v. Campbell and Morgan v. Thornhill* and *Conro v. Crane*. Yet the Act of January 28, 1915, ch. 22, sec. 4, as amended September 6, 1916, ch. 448, sec. 3,

⁸⁸ *Ross v. Stroh* (1908), 165 Fed. 628, at 630.

⁸⁹ *Morgan v. Thornhill*, 11 Wall. 65, 20 L. ed. 60; *Wiswall v. Campbell* (1876), 93 U. S. 347, at 348, 23 L. ed. 923, cases cited; *Conro v.*

Crane (1876), 94 U. S. 441, at 443, 24 L. ed. 145.

⁹⁰ *Wiswall v. Campbell* (1876), 93 U. S. 347, at 348, 23 L. ed. 923.

⁹¹ *Holden v. Stratton* (1903), 191 U. S. 115, at 117, 48 L. ed. 116.

39 Stat. 726, may make some change by allowing certiorari by the Supreme Court of the United States as provided therein.^{91a} Certiorari might also be allowed under a reasonable construction of subdiv. d of sec. 25.⁹²

The jurisdiction of appellate courts under the Bankruptcy Act is provided for in secs. 24a and b.

Appeals and errors are provided for under the Bankruptcy Act in secs. 25a, b, c and d.

(b) **Section 24a** relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction vested in them at law and in equity by sec. 2 of the Bankruptcy Act to settle estates of bankrupts and to determine controversies in relation thereto.⁹³

When, therefore, such bankruptcy courts, in marshaling and distributing assets which have come into their possession, control and custody, act as courts of equity, and wherever any party intervening raises a distinct and separable issue or controversy involving substantial pecuniary rights, an appeal lies.⁹⁴

"An intervention for the purpose of asserting a title or claim to property in the possession of the bankrupt's trustee is an intervention in equity and a decree is reviewable by appeal to the circuit court of appeals in the exercise of its general appellate powers in equity cases under sec. 24a of the Bankruptcy Act."⁹⁵

Under sec. 24a are included controversies arising in bankruptcy in the nature of plenary suits, concerning property claimed by others than the bankrupt. They do not come under the special provisions of the Bankruptcy Act governing petitions for review and appeals, but take the course of ordinary cases in equity and are not final in the circuit court of appeals where other cases of a similar character would not be.⁹⁶

^{91a} Finality is essential to this remedy by certiorari. *Bruce v. Tobin* (1917), 245 U. S. 18.

⁹² *Holden v. Stratton* (1903), 191 U. S. 115, at 119, 48 L. ed. 116.

⁹³ *Hewitt v. Berlin Machine Works* (1903), 194 U. S. 296, at 300, 48 L. ed. 986.

⁹⁴ *Burleigh v. Foreman* (1903), 125 Fed. 217, at 219.

⁹⁵ Mr. Justice Lurton in *Houghton v. Burden* (1912), 228 U. S. 161, at 165, 57 L. ed. 780. See *Knapp v. Milwaukee Trust Co.* (1909), 216 U. S. 545, at 553, 54 L. ed. 610.

⁹⁶ *Lazarus v. Prentice* (1913), 234 U. S. 263, at 268, 58 L. ed. 1305.

(c) **Section 24b** gives the several circuit courts of appeals jurisdiction "to superintend and revise in matters of law proceedings of the several inferior courts of bankruptcy within their jurisdiction."⁹⁷ The allowance or the rejection of a debt or claim is a part of the bankruptcy proceedings, and not an independent suit, and an appeal is not allowed under the Bankruptcy Act.⁹⁸

"The proceeding under this section is designed to enable the circuit court of appeals to review questions of law arising in bankruptcy proceedings, and is not intended as a substitute for the right of appeal upon controverted questions of fact under the right of appeal given in controversies arising in bankruptcy proceedings (sec. 24) or the special appeal given in certain cases under sec. 25."⁹⁹

Said Mr. Justice Day of the supreme court in *Matter of Loving*:¹ "We think this subdivision (24b) was not intended to give an additional remedy to those whose rights could be protected by an appeal under sec. 25 of the act. * * * We do not think it was intended to give persons who could avail themselves of the remedy by appeal under sec. 25 a review by petition under sec. 24b.

"The object of sec. 24b is rather to give a review as to matters of law where facts are not in controversy, of orders of courts of bankruptcy in the ordinary administration of the bankrupt's estate.

"In our judgment the rule was well stated in *In re Mueller*, 135 Fed. Rep. 711, by Mr. Justice Lurton, C. J. (p. 715): "The proceedings renewable [under sec. 24b] are those administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the

⁹⁷ *Coder v. Arts* (1908), 213 U. S. 223, at 233, 53 L. ed. 772; *Burleigh v. Foreman* (1903), 125 Fed. 217, at 219; *Holden v. Stratton* (1903), 191 U. S. 115, at 117, 48 L. ed. 116; *Whitla & Nelson v. Boyd* (1914), 213 Fed. 587, at 588.

⁹⁸ *Holden v. Stratton* (1903), 191 U. S. 115, at 117, 48 L. ed. 116.

⁹⁹ *Coder v. Arts* (1908), 213 U. S. 223, at 233, 53 L. ed. 772. See *Lazarus v. Prentice* (1913), 234 U. S. 263, at 268, 58 L. ed. 1305.

¹ *Matter of Loving* (1911), 224 U. S. 183, at 187, 56 L. ed. 725.

estate, which are not made specially appealable under sec. 25a. This would include questions between the bankrupt and his creditors of an administrative character and exclude such matters as are appealable under sec. 24a.”²

“Under sec. 24b such administrative orders and decrees in the course of bankruptcy proceedings are reviewed as are not made specially appealable under sec. 25a.”³

(d) **Section 25a** relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required.⁴

(e) **Section 25b** provides for appeals “from any final decision of a court of appeals, allowing or rejecting a claim under this act,” where the amount in controversy exceeds the sum of two thousand dollars, and the question involved was one which might have been taken from the highest court of a state to the Supreme Court of the United States, or where some justice of the supreme court certifies that “in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States.”⁵

(f) **Establishment of Reviews by United States Judicial Code.** The appellate and supervisory jurisdiction conferred by the Bankruptcy Act is established in the circuit courts of appeals by par. 130 of the United States Judicial Code.

The appellate and supervisory jurisdiction conferred by the Bankruptcy Act is established in the Supreme Court of the United States by par. 252 of the United States Judicial Code.

§ 365. Practice on Revisory Petitions. Neither the Bankruptcy Act nor the General Orders in Bankruptcy prescribe the

² Quoted by Mr. Justice Day in *Matter of Loving* (1911), 224 U. S. 183, at 188, 56 L. ed. 725.

³ *Lezarus v. Prentice* (1913), 234 U. S. 263, at 268, 58 L. ed. 1305.

⁴ *Hewitt v. Berlin Machine Works* (1903), 194 U. S. 296, at 300, 48 L. ed. 986; *Holden v. Stratton* (1903), 191 U. S. 115, 48 L. ed.

116; *Coder v. Arts* (1908), 213 U. S. 223, at 233, 53 L. ed. 772; *Matter of Loving* (1911), 224 U. S. 183, at 186, 56 L. ed. 725.

⁵ *Holden v. Stratton* (1908), 191 U. S. 115, at 117, 48 L. ed. 116; *Hewitt v. Berlin Machine Works* (1903), 194 U. S. 296, at 299, 48 L. ed. 986.

practice to be adopted in proceedings on revisory petitions, nevertheless the matters of law of which revision is sought should in some manner be clearly presented.⁶

On petitions of this class the record should present to the court of revision simply, clearly and unequivocally the issues of law to the like effect, as bills of exceptions, proceedings, without a jury and proceedings in the supreme court on admiralty appeals.⁷ Likewise, in order that it may appear by the record that issues raised on appeal were presented below, findings of fact which involve distinct propositions of law or something else as a substitute therefor are unnecessary.⁸

Likewise courts of revision will not ordinarily take jurisdiction in such proceedings over propositions not brought specifically to the attention of the lower court.⁹

Appeal from Order Appointing Receiver in Bankruptcy. There is no special provision in the Bankruptcy Act for an appeal from an order appointing a receiver in bankruptcy, but the Judicial Code of the United States, sec. 129, provides for appeals from a United States district court to the circuit court of appeals upon a hearing in equity asking for the issuance of an injunction or the appointment of a receiver.

Although bankruptcy proceedings strictly are proceedings in rem, nevertheless the administration by the bankruptcy courts is an administration in equity. It must therefore follow that the appointment of a receiver in bankruptcy by a district court is upon a hearing in equity, and the provision of Judicial Code, sec. 129, must apply, and appeals must be had from such an appointment to the circuit court of appeals.

EFFECT OF APPOINTMENT OF RECEIVER IN BANKRUPTCY

§ 366. Time of Taking Effect of Receivership in Bankruptcy. Since proceedings in bankruptcy are a caveat to all

⁶ *Ross v. Stroh* (1908), 165 Fed. 628, at 630.

⁷ *In re Boston Dry Goods Co.* (1903), 125 Fed. 226, at 227; *In re O'Connell* (1904), 137 Fed. 838.

⁸ *In re O'Connell* (1904), 137 Fed. 838.

⁹ *Shoe and Leather Reporter, et al.*, 129 Fed. 588, 589; *In re O'Connell* (1904), 137 Fed. 838, at 839.

the world when the petition is filed and since such proceedings are proceedings in rem, the property of the bankrupt is in the jurisdiction of the bankruptcy court where such petition is filed.¹⁰ This applies to goods held by the bankrupt or for him. At the time of the entry of a decree appointing a receiver the bankruptcy court assumes not only jurisdiction over the bankrupt's property, but constructive possession¹¹ which may ripen into actual possession when the receiver actually seizes the property. In other words, as said by United States District Judge Holt of the District Court, Southern Division, New York, in 1903: "When a petition [in bankruptcy] is filed before a state court acts, the state court can not by any subsequent action claim to have first taken possession of the res. The fact that the bankruptcy court may not have yet made an adjudication and that no receiver or trustee has yet been appointed, in my opinion is immaterial. The bankrupt's property is within the jurisdiction of the bankruptcy court as soon as the petition is filed, so far as to prevent a state court which subsequently seizes the property from being held to have first obtained exclusive jurisdiction."¹²

Said Mr. Justice Day: "The filing of the petition and adjudication in the bankruptcy court in New York brought the property of the bankrupts wherever situated into custodia legis, and it was thus held from the date of filing the petition, so that subsequent liens could not be given or obtained thereon or proceedings had in other courts to reach the property, the court of original jurisdiction having acquired the full right to administer the estate under the Bankruptcy Law."¹³

The entry of a decree appointing a receiver of the goods, chattels, property and effects of the alleged bankrupt, even

¹⁰ In re Alton Mfg. Co. (1908), 158 Fed. 367, at 369; Bryan v. Bernheimer, 181 U. S. 192, 21 Sup. Ct. 557, 45 L. ed. 814.

¹¹ In re Alton Mfg. Co. (1907), 158 Fed. 367, at 369. See Farmers Loan Co. v. Lake, etc. (1899), 177 U. S. 51, 44 L. ed. 667.

¹² In re Hemger, Bergman & Co. (1903), 126 Fed. 875, at 876. See In re Kleinhaus (1902), 113 Fed. 107.

¹³ Lazarus v. Prentice (1913), 234 U. S. 263, at 266, 58 L. ed. 1305.

though the receivers were required later to give bond, would confer jurisdiction over the property of the bankrupt by the court of bankruptcy as of the date of the entry of the order, even if there has been no adjudication of bankruptcy and even if the receiver has performed no act amounting to an actual taking of possession.¹⁴

§ 367. Effect of Petition in Bankruptcy on Property of Bankrupt. The filing of a petition in bankruptcy against a debtor is a caveat to all the world. It has the effect of an attachment and an injunction. Thereafter all the property rights of the debtor are ipso facto in abeyance until the final adjudication. Those who deal with the property of the bankrupt in the interval between the filing of the petition and the final adjudication do so at their peril.¹⁵

A bankruptcy proceeding is a proceeding strictly according to statute and is strictly a proceeding in rem contemplating only temporary control of certain property. Accordingly a proceeding in bankruptcy is sui generis. The filing of an involuntary petition in bankruptcy is not the commencement of a suit against the failing debtor to recover debts due. It contemplates rather the collection and distribution of an estate.¹⁶ The very property sought to be reached has been by virtue of the act of congress brought sub modo under federal influence and control by the filing of the involuntary petition which so to speak imposed a status upon all the property of the alleged bankrupt everywhere.¹⁷ At the date of the petition in bankruptcy the creditors acquire a right in rem against the assets.¹⁸

¹⁴ *In re Alton Mfg. Co.* (1908), 158 Fed. 367, at 369.

¹⁵ *Bank v. Sherman* (1879), 101 U. S. 403, at 406, 25 L. ed. 866; *Mueller v. Nugent* (1901), 184 U. S. 1, at 14, 45 L. ed. 711.

¹⁶ *In re Henderson* (D. C.), 9 Fed. 196, 10 Fed. 385; *In re Hicks* (1901), 107 Fed. 910, at 911; *In re Benedict* (1905), 140 Fed. 55, at 59.

¹⁷ *In re Benedict* (1905), 140 Fed. 55, at 60; *In re Watts & Sachs* (1902), 190 U. S. 1, at 28, 47 L. ed. 1084.

¹⁸ *Sexton v. Dreyfus* (1910), 219 U. S. 339, at 345, 55 L. ed. 244.

Said J. B. McPherson, District Judge of the Eastern Division, Pennsylvania, 1910, as follows: "It needs neither discussion nor citation to establish the proposition that a bankrupt has no lawful authority to dispose of property in his possession and claimed by the bankrupt's creditors after a petition in bankruptcy has been filed against him and a subpoena has been served upon him. It is not for the bankrupt and claimant to decide the question of ownership summarily and dispose of the property which was in the bankrupt's exclusive possession when proceedings were begun. The bankrupt's creditors have a right to be heard upon the question whether the bankrupt was the owner as he seemed to be, or was only bailee for hire."¹⁹

§ 368. Effect of Appointment of Receiver in Bankruptcy on Property of Bankrupt. Since the effect of filing a petition in bankruptcy is a caveat to all the world and is in effect an attachment and injunction,²⁰ and since thereafter all property rights are in abeyance until the final adjudication,²¹ it follows that the appointment of a receiver following the petition in bankruptcy can not have much additional effect on the property rights of the alleged bankrupt.

However, the effect of the appointment is to actually or constructively place the property of the bankrupt in the possession of the court, whereas, before the appointment of a receiver, the world was simply warned to take notice that the jurisdiction of the courts of bankruptcy had attached to that property.²²

§ 369. Effect of Appointment of Receiver on Title to Bankrupt's Property. A receiver in bankruptcy under the English Act and under the American Act gets no title to the property of the bankrupt. A receiver under the American Act becomes a custodian of the property.²³

¹⁹ *In re Potteiger* (1910), 181 Fed. 640.

²⁰ See secs. 366 and 367, *supra*.

²¹ See secs. 366 and 367, *supra*.

²² See various phases of the situation discussed in the subdivision of

this chapter under respective headings.

²³ *In re Rubel* (1908), 166 Fed. 131; *In re Leonard* (1910), 177 Fed. 503; *Freehold Const. Co. v. Bernstein* (1908), 113 N. Y. S. 368, 60 N. Y. Misc. Rep. 363.

“It is the immediate duty of the receiver of the property to preserve the estate intact and to conserve the assets and estate of the bankrupt, pursuing that course pointed out by the Act which will best promote and further the interests of the creditors. The receiver is not vested with title to the property of which he becomes custodian, nor does any provision of the Bankruptcy Act vest him with powers similar to that of a trustee appointed by the creditors. The property, however, corporeal and incorporeal, either comes into his possession as an officer of the court, or such right to possession is obtained as will tend to retain intact the actual and visible assets of the bankrupt to the end that, when an adjudication is made, the trustee may be vested not merely with the bankrupt’s title to the property, but that he may have and receive the actual possession of the assets in the control of the bankrupt at the instant that the protection of the court was invoked.²⁴

The Bankruptcy Act provides that the title to the bankrupt’s property shall vest in the trustee to be selected by the creditors; that such officer should have the general control and management of the estate and the right to recover for the benefit of creditors all property transferred in fraud of the act.

But it contemplated that between the filing of the petition and adjudication of bankruptcy an emergency might arise with respect to the care of the bankrupt’s property, and in involuntary cases for the protection of the property in the interval between the filing of the petition and the adjudication the bankruptcy court was authorized to direct the marshal to seize and hold the property pending adjudication. So also in voluntary or involuntary cases when it was found absolutely necessary for the preservation of an estate the court should appoint a receiver or the marshal to take charge of the property of the bankrupt until the petition was dismissed or the trustee qualified.²⁵

²⁴ *In re Kleinhaus* (1902), 113 Fed. 107.

²⁵ *Boonville N. B. v. Blakey* (1901), 107 Fed. 891, at 895.

However, until adjudication the title to the bankrupt's property remains in the bankrupt, whether or not a receiver is appointed.²⁶

§ 370. Effect of Appointment of Receiver in Bankruptcy on Claims or Judgments against Property of Bankrupt. It was held under the Bankruptcy Act of 1867,²⁷ and the same is true under the Bankruptcy Act of 1898, with the qualifications mentioned in this section of our work, that "The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary."²⁸

The filing of a petition in bankruptcy against an alleged bankrupt does not change a claim against such a bankrupt unless it comes within the provisions of sec. 67f of the Act of Bankruptcy.

Section 63a fixes liabilities evidenced by judgments absolutely owing at the time of filing of the petition, or founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of application for discharge may be proved and allowed, while under sec. 17 judgments in actions of fraud are not released by a discharge.

A judgment or decree in enforcement of an otherwise valid pre-existing lien is not the judgment demanded by the statute under sec. 67f, which is plainly confined to judgments creating liens.²⁹

An attachment sued out subsequent to the appointment of a receiver in bankruptcy and with the knowledge of his appointment, is void.³⁰

§ 371. Effect of Appointment of Receiver in Bankruptcy on Liens against Property of Bankrupt. Although the Constitu-

²⁶ *In re Zotte* (1911), 186 Fed. 84, at 85; *In re Michaelis & Lindeman* (1912), 196 Fed. 718, at 719.

²⁷ *Eyster v. Gaff* (1875), 91 U. S. 521, at 525, 23 L. ed. 403.

²⁸ *Eyster v. Gaff* (1875), 91 U. S. 521, at 525, 23 L. ed. 403.

²⁹ *Metcalf v. Barker* (1902), 187 U. S. 165, at 174, 47 L. ed. 122.

³⁰ *In re Muncie Pulp Co.* (1907), 151 Fed. 732, at 735.

tion of the United States may have given congress the power to divest rights and liens by the Bankruptcy Act, nevertheless congress has done so only to a limited extent as provided for in sec. 67f of the Bankruptcy Act of 1898.³¹

A lien created by a levy or a judgment or an attachment or otherwise where it has been obtained at any time within four months prior to the filing of the petition in bankruptcy, shall be deemed null and void in case such person is adjudicated a bankrupt. Where such lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized.³²

The appointment of a receiver has no more effect on a lien against the bankrupt's property than the filing of a petition in bankruptcy, for the receiver merely takes possession of the property as he finds it.

§ 372. Effect of Appointment of Receiver in Bankruptcy on Bank Deposits of Bankrupt. A receiver in bankruptcy is entitled to take custody of whatever is plainly the property of the bankrupt and against which no third party makes any claim with color of title.³³

As to checks drawn by a bankrupt and presented to the bank for payment after petition in bankruptcy has been filed, the Circuit Court of Appeals for the Second Circuit holds that a bank which has honestly paid such checks of a depositor without notice that any petition in bankruptcy has been filed against him, could not be made to pay such money back to the trustee in bankruptcy.³⁴

The court suggests that the trustee can after adjudication and the receiver before, compel surrender of assets in the possession of the bankrupt or of the alleged bankrupt or of any one for him. As to such persons the filing of the petition may be a caveat, attachment and injunction.³⁵

³¹ Metcalf v. Barker (1902), 187 U. S. 165, at 173, 47 L. ed. 122.

³² Metcalf v. Barker (1902), 187 U. S. 165, at 174, 47 L. ed. 122.

³³ In re Michaelis & Lindeman (1912), 196 Fed. 718.

³⁴ In re Zotti (1911), 186 Fed. 84.

³⁵ In re Zotti (1911), 186 Fed. 84, at 86.

§ 373. Effect of Appointment of Receiver in Bankruptcy on Contracts and Leases of Bankrupt. The decisions of the United States do not seem to be in accord as to whether an adjudication in bankruptcy terminates all the contractual relations of the bankrupt so that the relation of landlord and tenant is severed. Some courts, namely, the United States District Court for the Eastern Division of North Carolina³⁶ and the United States District Court of Kentucky³⁷ have held that an adjudication in bankruptcy terminates all contractual relations of the bankrupt, and a contract for the payment of a certain rent for a building occupied by a bankrupt, to continue during his lifetime, is terminated by the adjudication of the lessee as a bankrupt, and the lessee is clearly absolved from all contractual relations with and from all personal obligations to the landlord growing out of the lease.³⁸

However, the United States Circuit Court of Appeals for the Second District³⁹ and other courts⁴⁰ have held that bankruptcy does not sever such relation and the tenant remains liable, and that the obligation to pay rent is not discharged as to the future unless the trustee elects to retain the lease as an asset.

This latter view seems in accord with the English law.⁴¹

Upon the bankruptcy of the tenant, provided this does not by the express terms of the lease terminate the tenancy, the leasehold interest passes to the trustee in bankruptcy if he elects to accept it. He has a reasonable time within which the leave may be accepted. If in the meantime he occupies the premises, he is liable for merely the reasonable rent while so occupying, and not for the rent stipulated in the lease itself.⁴²

³⁶ *Bray v. Cobb* (1900), 100 Fed. 270.

³⁷ *In re Jefferson* (1899), 93 Fed. 948.

³⁸ *In re Jefferson* (1899), 93 Fed. 948, at 951.

³⁹ *In re Roth & Appel* (1910), 181 Fed. 667; *In re Sherwoods* (1913), 210 Fed. 754.

⁴⁰ *Watson v. Merrill*, 136 Fed. 362, 69 L. R. A. 719; *In re Hinkel Brewing Co.*, 123 Fed. 942; *In re Ellis*, 98 Fed. 968.

⁴¹ *In re Sherwoods* (1913), 210 Fed. 754, at 756; *Ex parte Houghton*, 1 Low. 554, Fed. Cas No. 6725.

⁴² *In re Sherwoods* (1913), 210 Fed. 754, at 757.

The lease does not pass to the receiver in bankruptcy in the sense that he has title like an assignee of the lease, but he may adopt the lease if he so elects. He has a reasonable time within which so to do, and if he occupies the premises in the meantime, he is occupying them by right of the law, and not by right of the lease alone. He, therefore, is liable merely for a reasonable rent, and not for the rent stipulated in the lease itself.⁴³

Such a receiver may further make an assignment of the lease because after the receiver takes possession it may be necessary that certain kinds of property should be sold for the very purpose of preserving it or its value.⁴⁴

The rule announced in *In re Sherwood* as to leases applies equally well to contracts to supply and take material.⁴⁵

When the receiver in bankruptcy, having taken possession of the assets of the bankrupt and reasonably exercises his option to adopt a contract of the bankrupt, by giving notice that he would adopt it and do his part to be performed, the other party to the contract becomes liable to perform.⁴⁶

§ 374. Effect of Bankruptcy Proceedings on State Proceedings. "The jurisdiction of the courts in bankruptcy in the administration of the affairs of insolvent persons and corporations is essentially exclusive."⁴⁷ This being so, bankruptcy courts may issue injunctions to stay proceedings in a state court to foreclose mortgages, to enforce other liens and even to forbid state officers from proceeding with executions upon judgments where in the opinion of the judge of the bankruptcy court it is to the interest of the general estate to do so.⁴⁸

⁴³ *In re Yondelman-Walsh Fdry. Co.* (1909), 166 Fed. 381.

⁴⁴ *In re Sherwood* (1913), 210 Fed. 754, at 757.

⁴⁵ *Southern Steel & Iron Co. v. Hickman, Williams & Co.* (1911), 190 Fed. 888.

⁴⁶ *In re Niagara Radiator Co.* (1908), 164 Fed. 102, at 104.

⁴⁷ *In re Watts & Sachs, Petitioners*, 190 U. S. 1, 47 L. ed. 933; *In re Benwood Brewing Co.* (1913), 202 Fed. 326, at 328.

⁴⁸ *New River Coal Land Co. v. Ruffner Bros.* (1908), 165 Fed. 881, at 886.

The intent of the Bankruptcy Law is to place the administration of affairs of insolvents exclusively under the jurisdiction of the bankruptcy courts, therefore, when application is made to the state courts which has custody of property through its receiver, such state court should at once turn over to the bankruptcy court the property belonging to the bankrupt.⁴⁹

However, "The debtor of a bankrupt or the man who contests the right to real or personal property with him loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions."⁵⁰ But if a judgment is rendered against the bankrupt, that does not mean that the fund or property could be taken from the possession of the bankruptcy court.⁵¹

Effect on State Court Receivership Four Months Preceding Bankruptcy. When a state court has acquired jurisdiction of the subject-matter and taken possession of the property more than four months before the adjudication in bankruptcy, such state court must be allowed to remain in control of the same and to dispose of it under its own decrees.⁵²

§ 375. Effect of Adjudication in Bankruptcy. Whereas the effect of a petition in bankruptcy is a caveat to all the world, the effect of the appointment of a receiver is custody by the court of the property of the bankrupt, although the legal title still remains in the bankrupt. The effect of the adjudication

⁴⁹ *In re Watts & Sachs* (1902), 190 U. S. 1, at 28, 47 L. ed. 1084; *Stacy v. McNicholas* (1915), 76 O. S. 167, 148 Pac. 67, at 72; *Pramuk's Appeal* (1915), 250 Pa. St. 45, at 51, 95 Atl. 326. See matter discussed in *Southern Loan & Trust Co. v. Benton* (1899), 96 Fed. 514, at 523. See, contra, *Springer v. Ayer* (1908), 50 Wash. 649, 97 Pac. 774; *State, ex rel., Heckman* (1902), 28 Wash. 37, 68 Pac. 170.

⁵⁰ *Eyster v. Gaff*, 91 U. S. 521,

23 L. ed. 403; quoted in *Skilton v. Codington* (1906), 185 N. Y. 80, at 85, 77 N. E. 790.

⁵¹ *Skilton v. Codington* (1906), 185 N. Y. 80, at 85, 77 N. E. 790; *Frank v. Vollkommer* (1906), 205 U. S. 521, at 529, 51 L. ed. 911; *Murphy v. John Hoffman* (1908), 211 U. S. 562, at 570, 53 L. ed. 327.

⁵² *Frazier v. Southern L. & T. Co.* (1900), 99 Fed. 707, at 715; approved in *Pickens v. Roy* (1902), 187 U. S. 177, at 180, 47 L. ed. 128.

in bankruptcy is to transfer the title of the property of the bankrupt and vest the same in the trustee who has the right under the control and authority of the court to administer the same.⁵³

Even though no trustee has been elected or appointed, if adjudication has been entered the bankrupt is by that entry divested of title.⁵⁴ Title passes to the trustee of the property of the bankrupt, as provided for in sec. 70 of the Bankruptcy Act.⁵⁵

§ 376. Effect of Dismissal of Petition in Bankruptcy on Receivership. The effect of the dismissal of a petition in bankruptcy is not always to automatically discharge the receiver if one has been appointed. A receiver is appointed by the court, is accountable by the court and can only be discharged by the court appointing him. When a decree has been entered dismissing a petition in involuntary bankruptcy and an appeal taken from that decree, the court may refuse to discharge a receiver if the reasons for his appointment continue.⁵⁶

§ 377. Effect of Appointment of Trustee in Bankruptcy on Receivership. Since the appointment or election of a trustee in bankruptcy by operation of law vests the title to the property of the bankrupt in the trustee, it is the duty of the receiver who has custody of such property to turn it over to the trustee. The duty of the receiver is to obey the court's instructions, therefore he is not discharged merely by the appointment or election of a trustee. After he has turned over the property to the trustee he still owes a duty to account to the court appointing him.

§ 378. When State Receivership an Act of Bankruptcy. Not every receivership, even though to finally administer a

⁵³ Robertson v. Howard (1912), 229 U. S. 254, at 260, 57 L. ed. 1174.

⁵⁴ In re Michaelis & Lindeman (1912), 196 Fed. 718, at 719.

⁵⁵ See In re Zotti (1911), 186 Fed. 84, at 85.

⁵⁶ In re Ward (1911), 194 Fed. 179.

debtor's assets or that results in finally administering a debtor's assets, is an act of bankruptcy, but only such receivership as the Bankruptcy Act so declares to be an act of bankruptcy. So a receivership is not an act of bankruptcy unless created because of insolvency as insolvency is defined by the Bankruptcy Act.⁵⁷

It is immaterial whether the state receivers were termed temporary or permanent; the real question is, was the decree appointing them based on the insolvency of the debtor as defined by the Bankruptcy Act?⁵⁸

POWERS AND DUTIES OF RECEIVER IN BANKRUPTCY

§ 379. Powers and Duties of Receivers in Bankruptcy—Generally. Since courts of bankruptcy have power to appoint receivers to preserve property, even without specific statutory powers, they have generally such powers as ordinary equitable receivers have when they are appointed to preserve property, even though the English and American Bankruptcy Acts do provide by statute some of the functions of such a receiver. When the statute speaks concerning the powers and duties of the receiver, the statute must govern, but since the court may “make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act, the general equitable principles must govern when the statute is silent. Such receiver must inventory, receive and retain in his possession all the assets of the alleged bankrupt.”⁵⁹

The receiver is not the legal representative of the bankrupt. And a provision in an insurance policy that the word “insured” shall include the legal representation does not entitle a receiver to take the place of the insured in answer to a demand by the

⁵⁷ *In re Butte-Duluth Mining Co.* (1915), 227 Fed. 334, at 335.

⁵⁸ *In re Wm. S. Butler & Co.* (1913), 207 Fed. 705; *James Supply, etc., v. Dayton, etc.* (1915), 223 Fed. 991, at 994; *In re Valentine-Bohl Co.* (1915), 224 Fed. 685;

In re Golden Malt Cream Co. (1908), 164 Fed. 326; *Maplecroft Mills v. Childs* (1915), 226 Fed. 415; *In re Commonwealth Lumber Co.* (1915), 223 Fed. 667.

⁵⁹ *In re Leonard* (1910), 177 Fed. 503, at 506.

company that the insured shall appear for examination under oath.⁶⁰ And where a corporation defendant in a suit for infringement of a patent was adjudged a bankrupt, and a receiver appointed for its property, after an interlocutory decree against it and a reference for an accounting as to damages and profits, the receiver could not be required to prepare a statement of profits for use before the master from the company's books or so render any of the active assistance to the complainant at the expense of the estate, unless he elects to become a party to the suit, but he may be required by subpoena to produce the books before the master.⁶¹

The United States Act of Bankruptcy, 1898, provides specifically for the appointment of receivers as follows:

"That courts of bankruptcy * * * are hereby invested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * *.

"(3) Appoint receivers or the marshals, upon application of parties in interest, in case the court shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee qualifies.⁶²

"(5) Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals or trustee, if necessary in the best interests of the estates, and allow such officers additional compensation for such service as prescribed in section forty-eight of this act.

"(15) Make such orders, issue such process, enter such judgments, in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act. * * * Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."⁶³

⁶⁰ *Sims v. Union Assur. Soc.* (1903), 129 Fed. 804.

⁶¹ *American Graphophone Co. v. Leeds* (1909), 174 Fed. 158.

⁶² Act of July 1, 1898, sec. 2 (3).

⁶³ United States Bankruptcy Act of July 1, 1898, sec. 2, (3), (5), (15), as amended; Act of February

Provision for seizure of the property of an involuntary bankrupt by a marshal is also made by sec. 69 of the Bankruptcy Act of 1898.

Courts of bankruptcy exercise such general legal and equitable powers outside of the regular order prescribed by the statute where the urgencies and special circumstances of the case seem to demand that such a course should be pursued in order to protect the rights given by statute.⁶⁴

The Bankruptcy Act of 1800⁶⁵ provided for the appointment of commissioners who might take into their possession the real and personal estate of the bankrupt.

The Bankruptcy Act of 1841 provided that the assets of the bankrupt should by decree of court be vested in an assignee.⁶⁶

The Bankruptcy Act of 1867 provided for the taking possession of, provisionally, of the property and effects of the involuntary bankrupt by the marshal.⁶⁷

And yet under all these acts receivers in bankruptcy were appointed to hold and preserve the property of the bankrupt until the commissioner or assignee should be appointed or selected.⁶⁸

Section 2 (2) of the Bankruptcy Act of 1898 shows the intention of congress not to prohibit courts of bankruptcy from appointing receivers in cases in which the Usages and Rules of Equity permit such an appointment, but to restrain the bankruptcy courts in such an appointment and to prevent the abuses which had been notoriously frequent.

Section 2 (5) of the Bankruptcy Act of 1898 was added as an amendment in 1910. It follows along the lines of an amendment of June 22, 1874, to the Bankruptcy Act of 1867. The amendment of 1910 is really a codification of the Usages and Rules of Equity regulating the appointment and power of a

5, 1903, and June 25, 1910. See *In re Fixen & Co.* (1899), 96 Fed. 748, at 753.

⁶⁴ *Blake, Moffitt & Towne v. Francis-Valentine Co.* (1898), 89 Fed. 691, at 696.

⁶⁵ Bankruptcy Act of 1800, sec. 5.

⁶⁶ Bankruptcy Act of 1841, sec. 3.

⁶⁷ Bankruptcy Act of 1867, sec. 40.

⁶⁸ See *In re Fixen & Co.*, 2 A. B. R. 821, 96 Fed. 748. Under Act of 1867, *Keenan v. Shannon*, Fed. Cas. 7640; *Lansing v. Manton*, Fed. Cas. 8077.

receiver to run a business. It makes definite and certain the power of a receiver in bankruptcy to run a business and in addition carefully restricts the compensation of such receiver for such services. This amendment was, it seems, inserted to restrain the running of business by receivers in bankruptcy and to militate against certain abuses and expenses resulting from such running of the businesses.

It is contemplated by the Bankruptcy Act of 1898 that a receiver should be appointed in an emergency to take charge of the property of the alleged bankrupt and preserve it. This is true in voluntary and involuntary cases.⁶⁹ It was contemplated that the administration of the assets of the bankrupt and the sale of them and the distribution should be in the hands of the creditors themselves acting through their chosen trustee. "It plainly was not contemplated that the receiver or the marshal so designated should supersede the trustee or exercise the general powers conferred upon the trustee."⁷⁰

"The receiver is a mere custodian"⁷¹ of the property; he is not clothed with title to the property, and until the trustee is appointed there is no legal representative of the property⁷² in the full sense of that term.

A receiver should not exceed the powers of his appointment, and if he does, he could not receive compensation for activities not authorized.⁷³

A receiver's powers and duties are largely determined by the questions for what purpose they were appointed, namely, to

(a) **Act as General Receiver.** See text under sec. 333.

(b) **Act as Mere Custodian.** See text under sec. 333.

(c) **Carry on Business of Bankrupt.** See text under sec. 333.

⁶⁹ *Boonville Nat. Bk. v. Blakey* (1901), 137 Fed. 891, at 895.

⁷⁰ See *In re Dempster* (1909), 172 Fed. 353, at 357; *In re Franklin Suit & Skirt Co.* (1912), 197 Fed. 591, at 601; *Shubinsky v. Bodek*, 172 Fed. 332, 22 A. B. R. 689.

⁷¹ *In re Kelly Dry Goods Co.*, 102

Fed. 747, 4 A. B. R. 530; *In re Benedict*, 140 Fed. 55, 15 A. B. R. 232; *In re Kolin*, 134 Fed. 557, 13 A. B. R. 533.

⁷² *In re Rubel* (1908), 166 Fed. 131, at 133.

⁷³ *In re Metropolitan Motor Car Co.* (1915), 225 Fed. 274, at 275.

§ 380. Powers and Duties, Generally, of Ancillary Receivers in Bankruptcy. An ancillary receiver ordinarily has no power to make a sale of a whole stock of non-perishable goods. The administration of a bankrupt's property is primarily in the court of bankruptcy exercising the original and primary jurisdiction. The ancillary receiver in bankruptcy has nothing to do in ordinary cases but collect the assets and wait for a trustee to be appointed in the original jurisdiction.⁷⁴

Said Buffington, C. J., speaking for the Circuit Court of Appeals for the Third District, as follows: "In the nature of things an ancillary receiver must be subject alone to and obey the orders of that court of which he is an officer."⁷⁵

§ 381. Limitations on Authority of Receiver in Bankruptcy. The appointment of a receiver in bankruptcy can only be made after the filing of the petition, because before that is filed there is no suit pending in which to predicate the receivership. The authority of the receiver ceases when the petition is dismissed or if there be an adjudication, or as soon as the trustee selected by the creditors is qualified.⁷⁶ A receiver under the American Bankruptcy Act is much like the interim receiver of the English Bankruptcy Act. Such a receiver is a mere custodian of the estate, with authority to inventory, receive and retain in his possession all the assets of the bankrupt.⁷⁷

§ 382. Delegation of Authority by Receiver in Bankruptcy. Says Bradford, D. J., speaking for the United States Circuit Court of Appeals, Third Circuit, as follows: "Authority to appoint and act through agents or custodians for the preservation and management of the property of a bankrupt after the receiver has once taken possession seems quite distinguishable from authority to create an agency for the original taking of possession. Authority of the former kind in many instances,

⁷⁴ *In re Brockton Ideal Shoe Co.* (1912), 174 Fed. 233.

⁷⁶ *M. Loeser v. Dallas* (1911), 192 Fed. 909, at 911.

⁷⁵ *In re Leonard* (1910), 177 Fed. 503.

⁷⁷ *In re Leonard* (1910), 177 Fed. 503.

without express provision, may be implied from the fact of the constitution of the receivership. But we are not prepared, nor is it necessary to hold that a receiver can, in the absence of a provision to that effect [in the order of appointment], delegate to another his authority originally to acquire possession." ⁷⁸

§ 383. Extraterritorial Power of Receiver in Bankruptcy. Much is said in the reports and collected in this chapter on the subject of "Territorial Limitations of Jurisdiction of Courts of Bankruptcy." Whatever may be the jurisdiction of a bankruptcy court over property outside of the district wherein the receiver was appointed, the receiver in bankruptcy has not title as a quasi-assignee, nor has he title like a trustee in bankruptcy. Not having title of any kind and being only an officer of the court which appointed him, he can not maintain an action in the district court of another district to recover assets in the hands of strangers. ⁷⁹

The Bankruptcy Act of 1898, with the amendments of 1903 and 1910, gives the district courts of the United States jurisdiction in bankruptcy "within the respective territorial limits."

Says Quarles, United States District Judge of the Eastern Division of Wisconsin: "It is difficult to see how such jurisdiction so qualified can be enlarged by an order. Any act by such receiver in Wisconsin pursuant to such an order (by the United States District Court of Illinois) would amount to an attempted exercise of jurisdiction outside the territorial limits. In other words, this limitation puts the court of bankruptcy and the receiver upon the same footing as to extraterritorial jurisdiction as the court of chancery operating through its receiver under a creditor's bill." ⁸⁰

§ 384. Agreements of Receiver in Bankruptcy Binding on Trustee. If a receiver makes an agreement concerning prop-

⁷⁸ Skubinsky v. Bodek (1909), 172 Fed. 340, at 341.

⁷⁹ In re Dunseath & Sons Co. (1909), 168 Fed. 973, at 975, citing Clark v. Booth, 17 How. 327, 15

L. ed. 164; Hale v. Allmon, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. ed. 380.

⁸⁰ In re Benedict (1905), 140 Fed. 55.

erty in his possession or in cases out of his possession,⁸¹ and such agreement is legal and the trustee receives the property under such an agreement, he is bound by the agreement of the receiver.⁸²

§ 385. Power over Property of Bankrupt in Hands of State Receiver. It is the intent of the Bankruptcy Law to place the administration of affairs of insolvents exclusively under the jurisdiction of the bankruptcy courts.⁸³ In order to the adequate enforcement of the provisions of the Bankruptcy Law, it is necessary that the powers of courts in bankruptcy should be, as they are, comprehensive.⁸⁴ When the United States Bankruptcy Act once takes hold of property such control is supreme over state court authority over the same property.

When property covered by bankruptcy proceedings is in the hands of a state court receiver, such receiver should deliver such property over to the federal bankruptcy court, unless such receiver is holding it under an honest adverse claim.⁸⁵ This is generally done as a matter of comity,⁸⁶ and it is the duty of the state court, after it has transferred the assets to receiver in bankruptcy, to settle the accounts of the state receiver and close its connection with the matter.⁸⁷

§ 386. Power over Property of Bankrupt Subject to Lien. Property belonging to a bankrupt on which there is a lien should be turned over to the receiver or trustee in bankruptcy.⁸⁸ Prop-

⁸¹ *Bryant v. Swofford Bros.* (1908), 214 U. S. 279, at 291, 29 Sup. Ct. 614, 53 L. ed. 997; *Ommen v. Talcott* (1909), 175 Fed. 261, at 266.

⁸² *Bryant v. Swofford Bros.* (1908), 214 U. S. 279, at 291, 29 Sup. Ct. 614, 53 L. ed. 997; *Ommen v. Talcott* (1909), 175 Fed. 261, at 266.

⁸³ *In re Watts & Sachs* (1902), 190 U. S. 1, at 28, 47 L. ed. 933.

⁸⁴ *In re Watts & Sachs* (1902), 190 U. S. 1, at 30, 47 L. ed. 933.

⁸⁵ *In re J. W. Zeigler Co.* (1911), 189 Fed. 259, at 260.

⁸⁶ See question discussed in *In re Watts & Sachs* (1902), 190 U. S. 1, 47 L. ed. 933; *In re J. W. Zeigler* (1911), 189 Fed. 259, at 262.

⁸⁷ *In re Watts & Sachs* (1902), 190 U. S. 1, at 35, 47 L. ed. 933. Fees allowed a state receiver for preserving estate although state court without authority to administer estate. *State of Missouri v. Angle* (1916), 236 Fed. 644, at 653.

⁸⁸ *In re Eurichs Ft. Hamilton Brewery* (1908), 158 Fed. 644.

erty of the bankrupt subject to a chattel mortgage should be retained by the receiver or trustee in bankruptcy.⁸⁹

§ 387. Power of Receiver in Bankruptcy to Apply for Examination of Bankrupt. United States Bankruptcy Act of July 1, 1898, sec. 21a, provides as follows:

“A court of bankruptcy may, upon application of any officer, bankrupt or creditor, by order require any designated person, including the bankrupt who is a competent witness under the laws of the state in which the proceedings are pending, to appear in court, or before a referee, or judge of any state court, to be examined concerning the acts, conduct or property of a bankrupt, whose estate is in process of administration under this act.”

A receiver is an officer.⁹⁰

General Order in Bankruptcy No. XXXVII⁹² establishes the rules of equity practice as regulating procedure in bankruptcy so far inter alia as taking testimony is concerned, and Equity Rule No. LXX provides for the examination of a single witness to a material fact even before defendant's answer.

An alleged bankrupt as to his own business dealings has been held to be a single witness as to a material fact.⁹³

An order for the examination of the bankrupt or alleged bankrupt⁹⁴ may be made and should in some cases be made on application of the receiver at the moment he is appointed.⁹⁵ “To wait until adjudication to ascertain from the bankrupt's own lips the situs of his property and his own explanations of the situation in which the creditors find themselves, is in many cases giving to those guilty of fraud just the necessary time

⁸⁹ *In re Victor Color & Varnish Co.* (1909), 175 Fed. 1023.

⁹⁰ United States Bankruptcy Act of July 1, 1898, sec. 1 (18).

⁹² General Orders in Bankruptcy, No. 37 (189 Fed. xiv, 32 C. C. A. xxxvi).

⁹³ *In re Fleischer* (1907), 151 Fed. 81, at 83.

⁹⁴ United States Bankruptcy Act of 1898, sec. 1, subdiv. 4 (30 Stat. at L. 544).

⁹⁵ *In re Fixen & Co.* (1899), 96 Fed. 748, at 753.

to permit the fraud to be consummated and the fruits thereof secured.”⁹⁶

§ 388. Power of Receiver in Bankruptcy to Incur Expense.

A receiver in bankruptcy has the duty to care for the property and may incur certain proper expenses for so doing as a premium for insurance⁹⁷ and other absolutely necessary expenses of preservation. Such power is the same as the Usages and Rules of Equity grant to receivers generally, with the qualifications and restrictions set forth in the Act of Bankruptcy.

§ 389. Power of Receiver in Bankruptcy to Employ—Generally. See sec. 389, ch. XVII, *supra*.

§ 390. Power of Receiver in Bankruptcy to Employ Attorney. Said Seaman, C. J., speaking for the United States Circuit Court of Appeals for the Seventh Circuit, as follows: “Ordinarily the duties of this statutory receiver (receiver under Act of 1898) neither require nor justify employment of an attorney, and that it is plain that no claim for such services is chargeable per se against the estate, predicated alone upon the fact of employment and services rendered.”⁹⁸

⁹⁶ *In re Fleischer* (1907), 151 Fed. 81, at 83.

In spite of the reasoning of *In re Fleischer* and in spite of the reasoning by Buffington, circuit judge (dissenting), in *Skubinsky v. Bodek* (1909), 172 Fed. 332, at 335, the majority of the court in the *Skubinsky* case held that United States Bankruptcy Act of July 1, 1898, ch. 541, sec. 21a, 30 Stat. 552 does not empower a court of bankruptcy to require a bankrupt to appear before a referee to be examined concerning the acts, conduct or property, etc., before his adjudication and before the time has

arrived when he is required to answer the petition. The author believes the majority of the court has failed to interpret the bankruptcy statute reasonably and in accordance with a fair import of the terms and as a remedial statute. A proceeding in bankruptcy is a proceeding in rem and jurisdiction of the rem takes effect at once upon filing the petition, so process of administration under this act may be held to commence with the filing of the petition.

⁹⁷ *In re Kyte* (1907), 158 Fed. 121, at 122.

⁹⁸ *In re T. E. Hill Co.* (1907), 159 Fed. 73, at 77.

Said Morrow, C. J., speaking for the United States Circuit Court of Appeals for the Ninth Circuit: "The employment of attorneys for a bankrupt estate is largely a matter of discretion in the court."⁹⁹

"Whether the receiver appointed has been given by the court the powers of a general receiver, mere custodian or power to carry on the business will have some bearing on the necessity of an attorney being employed.

"A temporary receiver charged simply with the custody and safekeeping of cash, stock and evidences of indebtedness of an alleged bankrupt should always apply to the court for leave to do so before employing an attorney at the expense of the estate."¹

§ 391. Power of Receiver in Bankruptcy to Borrow Money.

Section 2, par. 5, of the Bankruptcy Act of 1898 and its amendments expressly vest courts of bankruptcy with the power to "authorize the business of bankrupts to be conducted for limited periods by receivers, the marshal or trustees, if necessary in the best interests of the estate." If receivers are authorized to operate properties and businesses, it naturally follows that the bankruptcy court may raise on the credit of the values in hand the funds immediately necessary for the operation.²

When a bankruptcy court authorizes the receiver to borrow money it must be restrained in its exercise of this extraordinary power by the Rules and Usages of Equity in this connection which apply to ordinary equity receivers, and in addition take into consideration the question—was the receiver appointed in bankruptcy a general receiver, a mere custodian or a receiver to carry on business. The bankruptcy courts must, in addition, be guided by all the provisions of the Bankruptcy Act.

Implied Power of Receiver in Bankruptcy to Borrow Money.

Says Grubb, D. J., of the Northern District of Alabama:

⁹⁹ In re Charles Knosher & Co. (1912), 197 Fed. 136, at 143.

² In re Erie Lumber Co. (1906), 150 Fed. 817, at 827.

¹ In re Leonard (1910), 177 Fed. 503, at 507.

“For the purposes of this case it may be conceded that a receiver who is authorized to conduct a business, for the successful conduct of which the extension of credit and borrowing of money is necessary and customary, has the implied power to purchase on credit and even to borrow money. Such a power will be implied, however, only in the absence of an express power to borrow conferred by the court.”³

§ 392. Power of Receiver in Bankruptcy to Issue Receiver's Certificate. Section 2, par. 5, of the Bankrupt Act of July 1, 1898,⁴ and its amendments expressly vest courts of bankruptcy with the power to “authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals or trustees, if necessary in the best interest of the estates.” Authorized to operate the property through its receivers, it is equally competent for the court to raise on the credit of the values in hand funds immediately necessary for its operation and issue receivers' certificates.⁵

§ 393. Power of Court of Bankruptcy to Continue Business. Since under both the English and the American Bankruptcy Acts courts of bankruptcy have equitable powers,⁶ such courts have power to appoint a receiver to preserve property, even without specific statutory power, and such power would generally carry with it power to run a business for the purpose of preserving it. Nevertheless the United States Bankruptcy Act of 1898⁷ gives courts of bankruptcy power to “authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interest of the estates, and allow such officers additional compensation for such services as provided in sec. 48 of this act.”

³ In re C. M. Burkhalter & Co. (1910), 182 Fed. 353, at 355.

⁴ 30 U. S. St. at L., ch. 541.

⁵ In re Erie Lumber Co. (1906), 150 Fed. 817, at 827.

⁶ In re Gondie (1876), 2 Q. B. D. 483; In re Clark C. & C. Co. (1909), 173 Fed. 663.

⁷ United States Bankruptcy Act, 1898, sec. 2, subsec. 5.

The matter of continuing a going business until it can be determined whether or not such course will be for the best interest of all is so largely a matter of discretion confided to the bankruptcy courts that it would require a most extraordinary showing to persuade an appellate court to the conclusion that such discretion had been abused.⁸

As an incident to carrying on a business, a receiver in bankruptcy has been held to have implied power when properly authorized by the court appointing him to borrow money to carry on the business and issue receiver's certificates as evidence of such indebtedness.⁹

The intent of the bankruptcy provision concerning running a business seems to have been to make definite and certain the intent of congress to restrain the courts in such cases, and, most of all, to make definite and certain the compensation for services in so running the business.

(a) Discretion of Court to Continue Business. "This matter of continuing a going business till it can be determined whether or not such course will be for the best interests of all is so largely a matter of discretion confided to the bankruptcy courts¹⁰ that it would require a most extraordinary showing to persuade an appellate court to the conclusion that such discretion had been abused."¹¹

(b) Payment of Expenses of Continuing Business. Although there is direct authority in the Bankruptcy Act for a receiver continuing the business of the bankrupt, there is no provision for the expenses of so conducting the business or for the issuance of receiver's certificates to pay the expenses. But in proper cases the court may order such expenses paid out of the general estate of the bankrupt. If a lien creditor is properly in court and consents, the court may give the expenses or receiver's certificates if issued to pay such expenses priority over the lien.¹²

⁸ In re Isaacson (1909), 174 Fed. 406.

⁹ In re Restern (1908), 162 Fed. 986; In re Erie Lumber Co. (1906), 150 Fed. 817.

¹⁰ In re Cash-Papworth Grow Sir (1913), 215 Fed. 24.

¹¹ In re Isaacson (1909), 174 Fed. 406, 407.

¹² In re Clark Coal & Coke Co. (1909), 173 Fed. 658, at 663.

A court of bankruptcy has no power to take the proceeds of mortgaged property of the bankrupt which belongs to the lien creditor to pay the expenses of the general estate or the expense of conducting the bankrupt's business through a receiver or the trustee, without the consent of the lien creditor express or implied.¹³ Although a bankruptcy court is a court of equity, and courts of equity may empower receivers to issue receiver's certificates and permit expenses of running a railway to take priority to the lienholder's claims, this does not generally obtain under the Usages of Equity in cases of private corporations, and the Bankruptcy Act does not cover railways.

If the court does not actually authorize the receiver to borrow money, it has been conceded that "A receiver who is authorized to conduct a business for the successful conduct of which the extension of credit and borrowing of money is necessary and customary, has the implied power to purchase on credit and even borrow money."¹⁴ Such power of a receiver, however, if it does exist without court order, should be sparingly used.

(c) Borrowing Money to Continue Business. It is often the receiver's duty to maintain, as far as possible, the continuity of the alleged bankrupt's affairs so that, if no adjudication is made, his property and business may be redelivered to him damaged as little as possible by the proceedings in bankruptcy.¹⁵

Although there is no direct authorization in the Bankruptcy Act for the court directing the receiver to borrow money to conduct the business, all the authorities sustain the proposition that the court in bankruptcy has power to authorize a receiver to borrow money and issue receiver's certificates therefor and conduct the business of the bankrupt or the alleged bankrupt for the purpose of preserving the assets of the bankrupt's estate.¹⁶

¹³ In re Clark Coal & Coke Co. (1909), 173 Fed. 658.

¹⁴ In re C. M. Burkhalter & Co. (1910), 182 Fed. 353.

¹⁵ In re Richards, et al. (1903), 127 Fed. 772.

¹⁶ In re Restern (1908), 162 Fed. 986; In re Erie Lumber Co. (1906), 150 Fed. 817, 17 A. B. R. 689; In re Alaska Fishing & Development Co. (1909), 167 Fed. 875.

§ 394. Power of Receiver in Bankruptcy to Compromise Claims. Receivers in bankruptcy have no power or authority to compromise claims against the bankrupt or his estate. If they do attempt to do so, their actions are not binding on the trustee.¹⁷

Said Ray, D. J., of the United States District Court, Northern District, New York: "Receivers, prior to adjudication, are in no condition to adjust claims, liquidated or unliquidated, and have no power. They can not properly defend, or if they do, can not act intelligently, as their office is of short duration and their province is to care for and protect or preserve the property, not defend suits."¹⁸

§ 395. Power of Receiver in Bankruptcy to Sell Property. See subject of "Sales by Receivers in Bankruptcy."

§ 396. Power of Receiver in Bankruptcy to Contract and Lease.¹⁹ A receiver in bankruptcy who acts as a general receiver or a mere custodian has generally no need, and, therefore, no power to enter into contracts which may bind the estate of the bankrupt.

However, when the receiver is given power to carry on a business, it must follow that he has certain limited powers to contract in carrying on that business. A receiver in bankruptcy, like any other receiver who acts or contracts beyond his powers, necessarily assumes individual responsibility.²⁰

§ 397. Receiver in Bankruptcy—Duty to Give Bond. Although there is no direct provision in the Bankruptcy Act making it mandatory on the receiver to give bond for the faithful performance of his duties, nevertheless the Usages and

¹⁷ Southern Steel & Iron Co. v. Hickman, Williams & Co. (1911), 195 Fed. 888, at 892.

¹⁸ In re Heim Milk Product Co. (1910), 183 Fed. 787, at 788.

¹⁹ For the effect of bankruptcy proceedings on contracts and leases of bankrupt. See sec. 373, ch. xvii, supra.

²⁰ In re Kalb & Berger Mfg. Co. (1908), 165 Fed. 895, at 896. See 166 Fed. 381.

Rules of Equity apply, and courts of bankruptcy will require the receiver to enter into a good and sufficient bond. This bond should follow the form prescribed for a trustee's bond by the Official Form in Bankruptcy No. XXV. Although the court may constructively take possession of the assets of the bankrupt by its entry of the appointment of a receiver, the receiver himself should not be allowed to take actual custody of the property until he has given bond and it has been accepted by the court as good and sufficient.

§ 398. Receiver in Bankruptcy—Duty to Take Oath of Office. It is the receiver's duty to take an oath of office upon his appointment. This should be evidenced by a formal signature to an oath taken before the court or the clerk of the court, or an officer duly authorized by law to administer oaths. This written oath should be dated and properly filed among the papers of the case.

§ 399. Receiver in Bankruptcy—Duty to Take Possession of Bankrupt's Property. There is a provision in the United States Bankruptcy Act of July 1, 1898, for the seizure of property of the bankrupt by a marshal.²¹

Although a receiver in bankruptcy is not given direct power by statute to seize the property of the bankrupt, he may seize and take possession of the same upon a proper order from the bankruptcy court appointing him.

“Courts of bankruptcy * * * are hereby invested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings.

“* * * Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.”²² The Bankruptcy Act should be interpreted reasonably and ac-

²¹ United States Bankruptcy Act of July 1, 1898, sec. 69.

²² United States Bankruptcy Act of July 1, 1898, sec. 2.

ording to a fair import of its terms, with a view to effect its objects and to promote justice.²³

A court of bankruptcy has general equity powers.²⁴ It therefore follows that a receiver in bankruptcy may be ordered to seize property as any other equitable receiver might be ordered to seize property.

Goods in Custody of Carrier. If a bankrupt, should proceedings in bankruptcy not have intervened, had been entitled to possession of goods from a railroad upon the payment of the proper freight charges, then it follows that a receiver of the property of such an alleged bankrupt as caretaker and custodian of such property is on like conditions entitled to the same, and a wrongful refusal by the carrier makes such carrier the agent or custodian for the receiver shifting possession and vesting title accordingly, thereby terminating the right of stoppage in transit.²⁵

§ 400. Receiver in Bankruptcy—Duty to Safely Deposit Money or Funds. Section 61 of the Bankruptcy Act of 1891 makes it the duty of courts of bankruptcy to designate by order banking institutions as depositories of funds of bankrupt estates and to require of them bonds for the safekeeping and forthcoming thereof.²⁶

To deposit the funds of a bankrupt estate in any bank other than a designated depository renders the officers making such deposit liable.²⁷

Section 47a (3) specifically applies to trustees, and makes it the duty of the trustee to deposit all money received by him in one of the designated depositories, and General Order in Bankruptcy No. XXIX prescribes the method of withdrawal,

²³ Blake, Moffitt & Towne v. Francis-Valentine Co. (1898), 89 Fed. 691, at 693.

²⁴ Le Master v. Spencer (1913), 203 Fed. 210, at 216; In re Fixen & Co. (1899), 96 Fed. 748, at 753; Beach v. Macon Grocery Co. (1902),

8 A. B. R. 751; Snubinsky v. Bodek (1909), 172 Fed. 332, at 335.

²⁵ In re White (1913), 205 Fed. 393, at 394.

²⁶ Huttig Mfg. Co. v. Edwards (1908), 160 Fed. 619, at 622.

²⁷ In re Hoyt (1903), 119 Fed. 987, at 988.

with signature of the clerk or trustee and countersigned by the judge or referee. These provisions are mandatory and were designed to insure the safety of the funds rather than an increment by way of interest while they were idle.²⁸

There is no special provision for the withdrawal of funds by a receiver after he has deposited them in the designated depository, nevertheless the same care and safeguarding as provided for trustees should be followed by receivers.

§ 401. Receiver in Bankruptcy—Duty to Account. After a trustee is appointed it is the duty of the receiver to turn over to him the assets of the bankrupt in the receiver's hands. Receivers should turn over the assets at once, and not wait until they have had their accounts passed and are discharged.²⁹ Nevertheless it has been held that receivers may properly retain a sufficient sum of money to cover the probable expenses of the receivership.³⁰

§ 402. Receiver in Bankruptcy—Duty to Turn Over Assets to Trustee. It is primarily the duty of a receiver to preserve temporarily the assets of the bankrupt; it is the duty of the trustee to administer them. Just as soon as the trustee is appointed it is the duty of the receiver to turn over to such trustee all the assets in his hands, with this exception: "A receiver may properly retain a sufficient sum to cover the probable expenses of the receivership, but any surplus should be immediately turned over to the trustee as soon as he is appointed in order that an immediate dividend may be declared."³¹

§ 403. Receiver in Bankruptcy—Duty to Collect Rents. Matters relating to rent or the possession of the property of the alleged bankrupt should be attended to by the receiver in bank-

²⁸ Huttig Mfg. Co. v. Edwards (1908), 160 Fed. 619, at 622.

²⁹ In re College Clothes Shop (1911), 192 Fed. 80.

³⁰ In re College Clothes Shop (1911), 192 Fed. 80.

³¹ In re College Clothes Shop (1911), 192 Fed. 80, 27 A. B. R. 10.

ruptcy, and the appointment of a trustee should be facilitated in every way in order that the title to the chattels real may devolve upon the trustee as soon as possible.³²

§ 404. Power of Primary Receiver in Other Jurisdiction.³³

That a district court of the United States may exercise ancillary jurisdiction has been determined by decisions of the United States Supreme Court³⁴ and has been declared so by statute. Such an ancillary court may appoint an ancillary receiver to assist the original receiver to collect the assets and perform other services.³⁵

The District Court, Eastern District of Louisiana, has gone a step further and held that one district court has jurisdiction to act summarily in aid of a receiver in bankruptcy appointed by another United States court.³⁶ The appeal of this decision states specifically that the District Court of Louisiana upon petition "confirmed the receiver as temporary receiver of that court."³⁷

LIABILITIES IN BANKRUPTCY RECEIVERSHIP

Since the liabilities of receivers in bankruptcy are predicated on the general usages of equity on the subject rather than on any peculiarities of the bankrupt acts we refer the reader to ch. XXIX, *infra*.

SUITS IN BANKRUPTCY PROCEEDINGS

§ 405. **Suits Are Either Plenary or Summary.** Said Mr. Justice Fuller, in discussing the power of a court of bankruptcy under the Bankruptcy Act of 1898 to proceed summarily or by plenary suit to obtain assets of the bankrupt in the physical possession of a third party or an agent of the bankrupt or of

³² *In re Fulton* (1907), 153 Fed. 664, at 666.

³³ See *Jurisdiction of Bankruptcy Courts* discussed at length, sec. 325, ch. xvii, *supra*.

³⁴ *Babbitt v. Dutcher* (1910), 216 U. S. 102-113, 30 Sup. Ct. 372, 54 L. ed. 402, 17 Am. Cas. 969; *Acme*

Harvester Co. v. Lumber Co., 222 U. S. 301-306, 32 Sup. Ct. 96, 56 L. ed. 208.

³⁵ *Lazarus v. Prentice* (1913), 234 U. S. 263, at 267, 58 L. ed. 1405.

³⁶ *In re A. Musica & Sons* (1913), 205 Fed. 413, at 415.

³⁷ *Lazarus v. Prentice* (1913), 234 U. S. 263, at 267, 58 L. ed. 1305.

of cases arising under the Act of 1898 and controlled by different principles. The first class is where there is a claim of adverse title to the property of the bankrupt, based upon a transfer antedating the bankruptcy.

"The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy." ³⁹

(a) Plenary Suits. In the former class of cases mentioned above a plenary suit must be brought either at law or in equity by the trustee, in which the adverse claim of title can be tried and adjudicated. ⁴⁰

Claims which must be adjudicated by plenary suit can only be brought in a court which would have had jurisdiction of a suit by the bankrupt against the adverse claimant, except where the defendant consents to be sued elsewhere. ⁴¹

(b) Summary Suits. In the latter class mentioned above it is not necessary to bring a plenary suit, but the bankruptcy court may act summarily and may make an order in a summary proceeding for the delivery of the property to the trustee without the formality of a formal litigation. ⁴² In a case in which the original court of bankruptcy could act summarily another court of bankruptcy sitting in another district can do so in aid of the court of original jurisdiction. ⁴³

³⁹ Mr. Justice Fuller in *Babbitt v. Dutcher* (1909), 216 U. S. 102, at 113, 54 L. ed. 402.

⁴⁰ Mr. Justice Fuller in *Babbitt v. Dutcher* (1909), 216 U. S. 102, at 113, 54 L. ed. 402; also, *In re Enrichs Ft. Hamilton Brewery* (1908), 158 Fed. 644.

⁴¹ *Babbitt v. Dutcher* (1909), 216 U. S. 102, at 113, 54 L. ed. 402; *Bardes v. Hawarden Bank*, 178 U. S. 524, 44 L. ed. 1175; *Jaquith v. Rowley*, 188 U. S. 620, 47 L. ed. 620.

⁴² *Babbitt v. Dutcher* (1909), 216 U. S. 102, at 113, 54 L. ed. 402; *Bryan v. Bernheimer*, 181 U. S. 188, 45 L. ed. 814; *Mueller v. Nugent*, 184 U. S. 1, 45 L. ed. 711; *In re Friedman* (1907), 153 Fed. 939, at 941; appeal decision in (1908), 161 Fed. 260; *In re Ross Shoe Mfg. Co.* (1909), 168 Fed. 39; *Musica v. Prentice* (1914), 211 Fed. 326, at 328.

⁴³ *Babbitt v. Dutcher* (1909), 216 U. S. 102, at 114, 54 L. ed. 402.

§ 406. Ancillary Receiver Bringing Summary Suit. By the decision of *Babbitt v. Dutcher*, 216 U. S. 102, and by clause 20 added to sec. 2 of the amendment of June 25, 1910, to the Bankruptcy Act of 1898, the bankruptcy courts were specifically given ancillary jurisdiction over persons and property within the respective territorial limits in aid of a trustee or receiver appointed in any court of bankruptcy.

Under this amendment just mentioned there can be no doubt that a court of bankruptcy may appoint an ancillary receiver and that he may take summary proceedings for the restoration of the bankrupt's estate which was in the custody of people having no right to it, in order that the same might be turned over to the bankruptcy court having jurisdiction for administration.⁴⁴

The reduction of the property of the bankrupt to actual possession is a mere detail to aid, in which a court of bankruptcy in another district has ancillary jurisdiction, regardless of the diversity of citizenship or amount, provided the property is found within the jurisdiction of the court.⁴⁵

§ 407. Suit to Seize Property of Bankrupt. When necessary to the preservation of the estate of the bankrupt and the security of the creditors, the bankruptcy court has power summarily to seize property in the hands of third persons alleged to belong to the bankrupt. The court should not authorize such a seizure except upon a petition very clearly and definitely setting forth all the facts, not merely suspicions, and the court should exact proper security to protect the rights of the third parties in whose hands the goods are alleged to be. Such petition should be presented by the creditors rather than by any temporary receiver, and they should be required to give bond before such seizure should be authorized.⁴⁶

The District Court of the United States on the bankruptcy side has no power summarily to try a question of title, if any

⁴⁴ *Lazarus v. Prentice* (1913), 234 U. S. 263, at 267, 58 L. ed. 1305. See *Musica v. Prentice* (1914), 211 Fed. 326.

⁴⁵ *In re A. Musica & Son* (1913), 205 Fed. 413, at 415.

⁴⁶ *In re Sunseri* (1907), 156 Fed. 103, at 105.

real question of title exists.⁴⁷ Such a court has no power summarily to order the appropriation by a receiver or a trustee of property obtained from the bankrupt, either by fraud upon him or in pursuance of his intent to hinder, delay or defraud his creditors if any property was so obtained.

But if property which had once been in the possession of the bankrupt is found in the possession of any person, and such person is, in the opinion of the court, very clearly but a cover or receptacle for that property which, as between the bankrupt and such other person, is still the property of the bankrupt, then a summary order is proper, and no pretended instruments of transfer, no apparatus of conveyance should prevail.⁴⁸

Said Amidon, D. J.,⁴⁹ speaking for the United States Circuit Court of Appeals for the Eighth Circuit: "It has been held that a receiver in bankruptcy has no power to maintain suits for the recovery of property in the possession of third parties under claim of right. *Boonville National Bank v. Blakey*, 107 Fed. 891, 47 C. C. A. 43; *In re Kolin*, 134 Fed. 557, 67 C. C. A. 481; *Guarantee Title & Trust Co. v. Pearlman* (D. C.), 144 Fed. 550. It would be easy to press the doctrine of these cases too far.

"It is true, as they hold, that the collection of the estate belongs to the trustee, but its preservation pending the election of a trustee is the duty of the receiver, and in many cases the property of the bankrupt can only be saved from dissipation by the receiver taking it into his immediate, actual possession. His powers of preserving the estate are larger than those of a trustee. When necessary for its preservation, the court may direct him to take possession of property, although the same is held adversely under a claim of right, property so situated that the trustee could only recover it by a plenary action. This is the express holding of the supreme court in *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. ed. 814."

⁴⁷ *In re Enrichs Ft. Hamilton Brewery* (1908), 158 Fed. 644; *In re Darlington Co.* (1908), 163 Fed. 389.

Fed. 939, at 941; affirming decision *In re Friedman* (1908), 161 Fed. 260.

⁴⁹ *In re Dempster* (1909), 172

⁴⁸ *In re Friedman* (1907), 153

Fed. 353, at 357.

Said Bradford, D. J.,⁵⁰ speaking for the United States Circuit Court of Appeals of the Third Circuit: "It is doubtless true that a receiver may be authorized by the court, even before an adjudication, to collect and secure possession of moneys and other property belonging to the alleged bankrupt."

§ 408. Contempt Proceedings against Third Party. When a court has appointed a receiver his possession is that of the court and can not be disturbed without leave of the court appointing the receiver. If a person intentionally interferes with such possession, he commits a contempt of court and is liable to punishment therefor.⁵¹

§ 409. Suits by Receiver in Bankruptcy Outside District where Appointed. While it is true that after the filing of a petition in bankruptcy in one district, the bankruptcy court of that district obtains jurisdiction of the property of the bankrupt wherever situated, nevertheless there is no provision whereby the process of one court of bankruptcy may be sent into another district. Furthermore, the receiver in bankruptcy has not title to the bankrupt's property as has the trustee.

It therefore follows that a receiver in bankruptcy, like any other equitable receiver, has no power to go into another district and therein bring suits to collect assets.⁵² Such actions must be brought by an ancillary receiver appointed in the foreign district.

§ 410. In What Courts Suits against Receiver in Bankruptcy Brought. Suits against receivers as a general rule can not be brought in the court of their appointment or in any other court except by leave first obtained. However, the fed-

⁵⁰ *Skubinsky v. Bodek* (1909), 172 Fed. 332, at 335; quoted with approval in *In re Franklin Suit & Skirt Co.* (1912), 197 Fed. 591, at 601.

⁵¹ *In re Dialogne* (1914), 215 Fed. 462, at 464.

⁵² *In re Dunseath & Sons Co.* (1909), 168 Fed. 973, at 975; *In re National Mercantile Agency* (1904), 128 Fed. 639.

eral statute [Act March 3, 1887, ch. 373, sec. 2, 24 Stat. 554, and Act of August 13, 1888, ch. 866, sec. 2, 25 Stat. 436 (U. S. Comp. Stat. 1901, p. 582)] provides in substance that a receiver appointed in a federal court may be sued without leave of court "in respect to any act or transaction of his in carrying on the business connected with" the property in his charge. This statute applies to receivers appointed in bankruptcy proceedings as well as to other receivers.⁵³

Such receivers can not be sued without leave unless they are carrying on the business of the bankrupt estate as they may be authorized to do by the bankruptcy court.⁵⁴

§ 411. Suit by Receiver to Set Aside Fraudulent Conveyance. It has been ruled by the United States Circuit Court, Southern District, Alabama⁵⁵ and other courts, that receivers in bankruptcy have no legal right or capacity to maintain a suit to set aside a fraudulent or preferential transfer made by the bankrupt, either before or after filing the petition in bankruptcy; that by the amendment of the Bankruptcy Act of February 5, 1903, the right to bring such a suit is exclusively in the trustee.⁵⁶

In view of the lengthy review of the jurisdiction of United States circuit, district and courts of bankruptcy found in *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 40 L. ed. 1175; in *Whitney v. Wenman* (1904), 198 U. S. 539, and in *Skubinsky v. Bodek*, 172 Fed. 335, and *In re Franklin Suit & Skirt Co.* (1912), 197 Fed. 591, we think that the receiver "being appointed to preserve and take charge of the property of the bankrupt,"⁵⁷ he may be authorized to bring a suit to set aside

⁵³ *In re Kalb & Berger Mfg. Co.* (1908), 165 Fed. 895, at 896; citing *In re Kanter & Cohen*, 121 Fed. 984; *In re Smith (D. C.)*, 121 Fed. 1014; *In re Kelly Dry Goods Co. (D. C.)*, 102 Fed. 747.

⁵⁴ *In re Kalb & Berger Mfg. Co.* (1908), 165 Fed. 895, at 896.

⁵⁵ *Frost v. Latham & Co.* (1910), 181 Fed. 866, at 869.

⁵⁶ *Boonville Nat. Bank v. Blakey* (1901), 107 Fed. 891, at 896.

⁵⁷ Act of 1898, sec. 2 (3); *Whitney v. Newman* (1904), 198 U. S. 539, at 551, 49 L. ed. 1157.

a preferential or fraudulent transfer when such suit is necessary to preserve the estate of the bankrupt.⁵⁸

§ 412. Defense of Suit against Bankrupt by Receiver. Said Ray, J., of the United States District Court, Northern District, New York: "Receivers, prior to adjudication, are in no condition to adjust claims, liquidated or unliquidated, and have no power. They may not compromise claims or admit or reject them. They can not properly defend, or if they do, can not act intelligently, as their office is of short duration and their province is to care for and protect or preserve the property, not defend suits."⁵⁹

SALES BY RECEIVER IN BANKRUPTCY

§ 413. Sales by Receiver in Bankruptcy—Generally. The sale of property by courts of bankruptcy is provided for in General Order in Bankruptcy No. XVIII,⁶⁰ which is as follows:

"3. Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss of the same if not sold immediately, the court, if satisfied of the facts stated and that a sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in the court."

The purpose of the appointment of a receiver in bankruptcy is one of mere temporary custody, and the duties are generally of the utmost simplicity.⁶¹ The chief purpose of the appointment of the receiver is "for the preservation of estates."⁶² No power is given to the receiver to sell, no power is denied.

⁵⁸ See *In re Alexander* (1911), 193 Fed. 749.

⁵⁹ *In re Heim Milk Product Co.* (1910), 183 Fed. 787, at 788.

⁶⁰ General Order in Bankruptcy No. XVIII (89 Fed. viii, 32 C. C. A. xx), quoted in *In re Sherwoods* (1913), 210 Fed. 754, at 757; quoted

in *In re Pedlow* (1913), 209 Fed. 210, at 211.

⁶¹ *In re T. L. Kelly Dry Goods Co.* (1900), 102 Fed. 747.

⁶² *In re B. D. Gardner & Co.* (1907), 153 Fed. 914; Act of Bankruptcy of 1898, sec. 2, subdiv. 3.

It has been the uniform practice of courts of bankruptcy under the act to make no order of sale until after adjudication of bankruptcy, and unless the property is of such nature that an immediate sale is necessary to preserve its value, no order of sale will be allowed the receiver.⁶³ The sale by a receiver in the ordinary course of trade when running a business is an exception to this rule.

“When the bankruptcy court in any case finds it absolutely necessary for the preservation of the estate to take possession of the property of the adverse claimant by means of a receiver or a marshal under clause 3 of sec. 2 of the Bankrupt Act, then such seizure and determination of the issues thus between the receiver or trustee and the adverse claimant is a proceeding in bankruptcy as distinguished from a controversy at law or in equity, and hence the bankruptcy court is authorized and empowered to proceed in a summary way rather than by a plenary suit.”⁶⁴

Said Rogers, C. J.,⁶⁵ speaking for the United States Circuit Court of Appeals for the Second Circuit: “In our opinion the court has full power in such cases (purpose of preserving property) to order a sale, and that such power is implied by clause 3 of sec. 2 of the act as well as by clause 7 of that section empowering the court to ‘cause the assets of bankrupts to be collected, reduced to money and distributed.’ In re Becker (D. C.), 98 Fed. 407; Loveland on Bankruptcy, 213.”

After the receiver has once taken possession the court may order him to sell property for the purpose of preserving it, either before⁶⁶ or after adjudication.⁶⁷

Said Hand, D. J., of the United States District Court, Southern District, New York: “When the court has full possession of the res, a possession which it can defend, all others

⁶³ In re T. L. Kelly Dry Goods Co. (1900), 102 Fed. 747.

⁶⁴ In re B. D. Gardner (1907), 153 Fed. 914.

⁶⁵ In re Sherwood (1913), 210 Fed. 754, at 757.

⁶⁶ In re Becker (1899), 98 Fed. 407; In re Sherwood (1913), 210 Fed. 754, at 757.

⁶⁷ Ommen v. Talcott (1909), 175 Fed. 261, at 266.

must come to it to assert any rights. If it has no possession, those who have are free to act as they choose, unless the court can obtain personal jurisdiction over them. But the court has power after adjudication, even through a receiver to sell the interests of all creditors and of the bankrupt. Where an adverse party has possession, it could not enforce the sale or put its purchaser in possession, but if the adverse party consents and co-operates, why can not the court in a necessary case pass title of the creditors and bankrupt quite as well as if it had possession?"⁶⁸

In the absence of the United States district judge and in case of a proper affidavit of the clerk or deputy clerk to that effect, the referee in bankruptcy is vested with the power to appoint a receiver and to order the receiver in a proper case to make a sale of perishable property.⁶⁹

§ 414. Sales before Adjudication Rare. An order of sale is not generally made before an adjudication⁷⁰ in bankruptcy, unless the property is of such a nature that immediate sale is absolutely necessary to preserve its value. If a sale has been made, however, before adjudication, a fair sum has been realized and no showing is presented of injurious effect upon any interests, such sale may not be set aside.⁷¹

§ 415. What Property Receiver in Bankruptcy Can Sell. The Bankruptcy Act of 1898, sec. 2, subdiv. 3,⁷² provides for the appointment of a temporary receiver to preserve the property until the petition in bankruptcy "is dismissed or the trustee is qualified." Such a receiver under proper orders of the bankruptcy court has power to do what is necessary to secure and effectuate such preservation. If property is deteriorating and

⁶⁸ *Ommen v. Talcott* (1909), 175 Fed. 261, at 266.

⁶⁹ *In re Kelly Dry Goods Co.* (1900), 4 A. B. R. 528, 102 Fed. 747.

⁷⁰ *Ommen v. Talcott* (1909), 175 Fed. 261, at 266.

⁷¹ *In re T. L. Kelly Dry Goods Co.* (1900), 102 Fed. 746, at 749.

⁷² Act of July 1, 1898, ch. 541, 30 U. S. St. at L. 541.

becoming worthless or likely to before a trustee can be appointed and make a sale, then the bankruptcy court has full jurisdiction and authority to order a sale of the property.⁷³

A sale of perishable property may be made with or without notice to the creditors.⁷⁴ If the property is only "perishable" in part only, such part of the entire property should be ordered sold.⁷⁵

The provision of General Order No. XVIII is held to include property which is liable to deteriorate in price and value, as well as property which deteriorates physically. A cargo of bananas would be perishable physically; a cargo of rifles might be of value if immediately sold, but valueless if delivery be delayed. Likewise a bankrupt's stock of handkerchiefs, linens and merchandise might be of value for Christmas sales, but much less salable later on in the year.⁷⁶

The rule is that the receiver can only sell property in his possession. Where an adverse party has possession the court could not enforce the sale or put its purchaser in possession, but if the adverse party consents and co-operates, then the court can make a sale.⁷⁷

(a) Cases Allowing Sales by Receiver in Bankruptcy. A liquor license has been held perishable property and ordered sold.⁷⁸

The assets and effects of a dealer in drugs, medical articles and druggists' sundries have been sold at private sale by a receiver in bankruptcy.⁷⁹

A stable company in the livery business, buying and selling horses and feed, is a trading and mercantile company. The bankruptcy court has power to appoint a receiver to preserve

⁷³ *In re B. D. Gardner & Co.* (1907), 153 Fed. at 915.

⁷⁴ General Order in Bankruptcy No. XVIII, sec. 3; *In re Harris* (1907), 156 Fed. 875, at 876.

⁷⁵ *In re Harris* (1907), 156 Fed. 875, at 876.

⁷⁶ *In re Pedlow* (1913), 209 Fed. 841.

⁷⁷ *Ommen v. Talcott* (1909), 175 Fed. 261, at 266; *Bryant v. Swoford Co.*, 214 U. S. 279, 29 Sup. Ct. 614, 53 L. ed. 997. See *Robertson v. Howard* (1912), 229 U. S. 254, 57 L. ed. 1174.

⁷⁸ *In re Becker* (1899), 98 Fed. 407.

⁷⁹ *In re J. Jungman* (1911), 186 Fed. 302.

the property of such a company and to turn the goods and chattels of such company into cash lest the keep and feed of the horses exhaust their value.⁸⁰

Bankrupt's stock of handkerchiefs, linens and merchandise was allowed in order that the same could be used for Christmas sales,⁸¹ likewise other stocks of merchandise.⁸²

Securities which the bankrupt had pledged may be ordered sold by the receiver with the consent of the banks and other pledgees.⁸³

A sale of merchandise out of the possession of the receiver was sold by him with the consent of the adverse party in possession, and the court upheld such sale.⁸⁴

(b) Cases Disallowing Sales by Receiver in Bankruptcy. A receiver was not allowed to sell property on the ground of its being perishable when the principal depreciation alleged had already occurred.⁸⁵

A petition for the sale of a stock of goods four days previous to the day appointed for a meeting of creditors was not allowed.⁸⁶

A receiver in bankruptcy has been allowed to sell and assign a leasehold estate.⁸⁷

A receiver should not attempt to sell a leasehold, and a sale by a receiver without express direction of the court of a chattel real conveys no title.⁸⁸

§ 416. Petition for Sale of Property by Receiver in Bankruptcy. General Order in Bankruptcy No. XVIII provides

⁸⁰ *In re De Lancey Stables Co.* (1909), 170 Fed. 860.

⁸¹ *In re Pedlow* (1913), 209 Fed. 841.

⁸² *In re J. Jungman* (1911), 186 Fed. 302; *In re B. D. Gardner* (1907), 153 Fed. 914.

⁸³ *In re James Carothers & Co.* (1911), 193 Fed. 687.

⁸⁴ *Ommen v. Talcott* (1909), 175 Fed. 261, at 266.

⁸⁵ *In re Duke & Son* (1912), 28 A. B. R. 195.

⁸⁶ *In re Desrochers* (1911), 25 A. B. R. 703, 183 Fed. 991.

⁸⁷ *In re Sherwoods* (1913), 210 Fed. 754, at 757. See *In re Fulton* (1907), 153 Fed. 664, at 666.

⁸⁸ *In re Fulton* (1907), 153 Fed. 664, at 666. See *In re Sherwoods* (1913), 210 Fed. 754, at 757.

specifically for a private sale of perishable property. "Upon petition by a bankrupt, creditor, receiver or trustee, setting forth that a part or the whole of the bankrupt's estate is perishable, the nature and location of such perishable estate, and that there will be loss if the same is not sold immediately, the court, if satisfied of the facts stated, and that the sale is required in the interest of the estate, may order the same to be sold, with or without notice to the creditors, and the proceeds to be deposited in court."⁸⁹

There is no provision of the Bankrupt Act compelling sales by courts of bankruptcy to be by public auction. Said Mr. Chief Justice White, of the United States Supreme Court, as follows:⁹⁰ "In view of the fact that the Bankruptcy Act was enacted long after the passage of the Statute of 1893 ('Sales by United States Courts'), and of the complete right of administration which the Bankruptcy Act confers over the property, real and personal, of the bankrupt estate, we think it follows that the authority to realize, by way of sale on the property of the bankrupts estate, can not be held to be limited by the provision of the Act of 1893."

§ 417. Sales at Public or Private Sale. The Bankruptcy Act confers over the property, real and personal, of the bankrupt estate complete administration to courts of bankruptcy and confers upon such courts full and complete equitable power in matters of the administration and sale of the bankrupt's estate.⁹⁰

Under Rule No. XVIII of the General Orders in Bankruptcy in disposing by sale of the property of the bankrupt, a bankruptcy court, as to both real and personal property, may, if reason for so doing exists, direct a private sale to be made.⁹¹

⁸⁹ General Order in Bankruptcy No. XVIII (98 Fed. viii, 32 C. C. A. xx).

⁹⁰ *Robertson v. Howard* (1912), 229 U. S. 254, at 263, 57 L. ed. 1174.

⁹¹ *Robertson v. Howard* (1912), 229 U. S. 254, at 263 and 264, 57 L. ed. 1174.

There is no distinction between a sale at auction and a private sale approved by the court so far as the purchaser's obligation to comply with his bid is concerned.⁹²

§ 418. Appraisement and Approval of Court. Section 70b of the Bankruptcy Act provides that: "All real and personal property belonging to the bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by and report to the court. Real and personal property shall, when practical, be sold subject to the approval of the court. It shall not be sold otherwise than subject to the approval of the court for less than seventy-five per cent. of its appraised value."⁹³

§ 419. Proceedings against Purchaser to Enforce Sale. "There is no sound distinction between a sale at auction and a private sale approved by the court so far as the purchaser's obligation to comply with his bid is concerned. In either case, by voluntarily becoming a purchaser of property sold under order of court, he submits himself to the jurisdiction of the court, and when such purchaser refuses without cause to carry out his contract, he may be compelled to do so by rule of attachment issuing out of the court under whose decree the sale is had."⁹⁴

PAYMENT AND DISTRIBUTION BY RECEIVER IN BANKRUPTCY

§ 420. Accounting by Receiver in Bankruptcy. It is the duty of a receiver in bankruptcy to file his account when the court orders him to do so. Just as soon as the trustee is appointed or the petition for bankruptcy dismissed it is the duty of the receiver to file his accounts. The court appointing the receiver in bankruptcy has jurisdiction to pass on the receiver's accounts and to surcharge the receiver's account in a proper

⁹² *In re J. Jungmann* (1911), 186 Fed. 302, at 305.

⁹³ Quoted in *Robertson v. Howard* (1912), 229 U. S. 254, at 263, 57 L. ed. 1174.

⁹⁴ *La Combe*, circuit judge, speaking for the United States Circuit Court for the Second Circuit in *In re J. Jungmann* (1911), 186 Fed. 302, at 305, and citations.

case and to order summarily the receiver to pay such a stated amount surcharged. He is an officer of the court and is in contempt if he refuses to obey such an order.⁹⁵

§ 421. Accounting by Ancillary Receiver in Bankruptcy. Said Buffington, C. J., speaking for the United States Circuit Court of Appeals for the Third District,⁹⁶ as follows: "In the nature of things an ancillary receiver must be subject alone to and obey the orders of that court of which he is an officer. So obeying, it follows that to it alone must he account; any other course would breed confusion in administration and go far toward making the exercise of ancillary jurisdiction impracticable; for if a court, in pursuance of comity, undertakes to exercise ancillary jurisdiction by administering local assets, what it alone has power and jurisdiction to administer, it follows that its hand must be free to administer by its own officer and to exact from him the full measure of duty. Such executive work it can only secure from an officer answerable to it alone. *Kirker v. Owings*, 98 Fed. 511, 39 C. C. A. 132; *Sands v. Neely*, 88 Fed. 133, 31 C. C. A. 424; *In re Isaacson*, 174 Fed. 406, 98 C. C. A. 614; *Ames v. Union Pacific Ry. Co. (C. C.)*, 60 Fed. 966." * * *

"These recognized principles and practices in ancillary proceedings we must assume congress had in view in passing the amendment in question (June 25, 1910). When in such cases the receiver of an ancillary court makes his accounting to his own court, that court meets all requirements of comity to the primary court by affording the latter, through its proper officers, the opportunity to question the correctness of the accounting to the ancillary court."⁹⁷

As to fees for attorneys for the receiver in bankruptcy only to the extent that they have acted directly in behalf of the estate

⁹⁵ *In re Reliable Bottle Box Co.* (1912), 199 Fed. 670.

⁹⁷ *Loeser v. Dallas* (1911), 192 Fed. 909, at 911.

⁹⁶ *In Loeser v. Dallas* (1911), 192 Fed. 909, at 911.

or it has been benefited by what they have done are they entitled to be paid out of it.⁹⁸

§ 422. Exceptions to Accounts of Receiver in Bankruptcy.

Creditors may except to the receiver's accounts for proper cause. When exceptions are allowed by the court the receiver may be surcharged. Review of the decision of the court and order on the exceptions may be had in the circuit court of appeals by a petition to revise under sec. 24b of the Bankruptcy Act of July 1, 1898, ch. 541, 30 Stat. 553 (U. S. Comp. Stat. 1901, p. 3432), and by an appeal under sec. 25a of the same act.⁹⁹ Exceptions to the account should be verified, but if not verified, the defect may be remedied by amendment.¹

§ 423. Payments by Receiver in Bankruptcy—Generally.

Since it is the receiver's duty to turn over the funds and property in his possession to the trustee when the trustee has duly qualified, it follows that the receiver ordinarily has few payments to make. However "a receiver may properly retain a sufficient sum to cover the probable expenses of the receivership."²

The Bankruptcy Act provides specifically for the court to direct the trustee to pay certain debts in certain order of priority,³ thereby indicating the intent of the Bankruptcy Act that the receiver in bankruptcy shall hand over the money and funds in his possession to the trustee and he shall be the administrator.

The expenses of a receivership ordinarily include fees to the receiver and his attorney's fees, if the receiver has been authorized to employ an attorney. If the receiver has been authorized to carry on the business of the bankrupt, then the expenses may be many and the priorities and payments complicated.

⁹⁸ In re Ketterer Mfg. Co. (1907), 156 Fed. 719, at 720. See sec. 425, *infra*.

⁹⁹ In re Schoenfeld (1901), 183 Fed. 219.

¹ In re Ketterer Mfg. Co. (1907), 156 Fed. 719.

² In re College Clothes Shop (1911), 192 Fed. 80, 27 A. B. R. 10.

³ Bankruptcy Act of 1898, sec. 64.

§ 424. Payment of Fees to Receiver in Bankruptcy. In determining what fee a receiver should receive, we must first look to the order appointing the receiver and to any subsequent orders and determine whether the receiver in bankruptcy had the powers and duties of (a) general receiver; (b) mere custodian; or (c) receiver to carry on the business of the bankrupt.⁴

In 1903 subdiv. 5 of the Bankruptcy Act was amended and in 1910 said subdiv. 5 was further amended.

The amendment of 1903 limited the discretion of the judges in allowing fees to the maximum for compensation to trustees provided for in sec. 48a. By the Act of 1910 sec. 48 was amended.

The purpose of the amendment of 1910 to sec. 48 of the Act of 1898, as stated by the report of the Senate Judiciary Committee of the Sixty-first Congress⁵ is as follows: "The present amendment fixes the maximum compensation that can be allowed receivers for the performance of the ordinary duties at precisely this same rate (the rate allowed trustees under sec. 48a), instead of leaving it to the unlimited discretion of the court. It also fixes the extra compensation, whether it be to the receiver or trustee, for the conducting of the business, to once again this same rate, so that, at best, the ordinary and extraordinary compensation taken together, in the event that both a receiver and trustee have successively had charge of the estate, and even both conducted the business, can not exceed four times the amount allowable to a trustee by sec. 48a of the act for the performance of his ordinary duties. The practical difficulty in the way of allowing commissions to receivers, where the receivers turn over to the trustee in specie the property which they have been taking care of, is obviated by the provision that the commissions are to be figured upon the amounts thereafter actually realized upon a sale of such property so turned over in specie."

⁴ See Powers and Duties of Receiver in Bankruptcy, sec. 379, ch. xvii, *supra*.

⁵ Congressional Reporter, No. 691.

“Thus the bill seeks to reduce to the one natural basis of commissions, on moneys actually realized, the compensation, both ordinary and extraordinary, of both trustee and receiver, and by this is done away with also the unlimited discretion of the courts in the allowance of compensation to such officers. Of course the rates of commission prescribed are maximum limitations. Less, but not more, may be allowed, and it is hoped the courts will exercise their discretion still in allowing less amounts where proper.”

(a) Fees as General Receiver. The Bankruptcy Act of 1898 as originally passed did not provide specifically for fees for receivers; courts granted compensation under the general equitable powers of the courts and limited the amount to reasonable compensation for the services performed.⁶

The maximum compensation that can be allowed receivers for the performance of the general duties of receivers is provided for under sec. 48d, namely, not to exceed \$5.00 deposited with clerk of court; 6 per cent. on first \$500; 4 per cent. on excess of \$500 and less than \$1,500; 2 per cent. on excess of \$1,500 and less than \$10,000; 1 per cent. on moneys in excess of \$10,000.

When a receiver has not carried on the business of the bankrupt according to the intent of the statute, yet when he has acted more than a mere custodian, he should be entitled to the compensation as receiver under sec. 48d of the Bankruptcy Act.⁷

(b) Fees as Mere Custodian. A receiver who acts as a mere custodian has few duties to perform. In such a case the proviso in sec. 48d of the Bankruptcy Act of 1898 as amended in 1903 and 1910, applies, and his compensation is limited to two per cent. on the first \$1,000 or less and one-half of one per cent. on that above.⁸

⁶ In re Scott (D. C.), 99 Fed. 404; In re Adams Sartorial Cut Co. (D. C.), 151 Fed. 215; In re Metropolitan Motor Car Co. (1915), 225 Fed. 274, at 276.

⁷ In re Charles Knosher & Co. (1912), 197 Fed. 136, at 143.

⁸ In re Griesheimer, et al. (1913), 209 Fed. 134; In re Ginsburg (1913), 208 Fed. 160, at 162. See In re Leonard (1910), 177 Fed. 503, at 508. See In re Metropolitan Motor Car Co. (1915), 225 Fed. 274.

(c) **Fees for Continuing Business.** The Bankruptcy Act of July 1, 1898, provides specifically for fees of the receiver in three cases:

1. Where he acts as receiver and disburses or turns over money.⁹

2. Where he acts as mere custodian.¹⁰

3. Where he conducts the business of the bankrupt.¹¹

The compensation of a receiver who has conducted a business is once again the compensation allowed him for performing the ordinary duties of a general receiver.

§ 425. Payment of Attorney's Fees. The Bankruptcy Act makes no direct provision for a stated fee to be paid to the attorney for the receiver, but it does say that the court may direct the trustee to pay "one reasonable attorney's fee for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases."¹² * * *

Some courts fix the fees for the attorney for the receivers and trustees in a sum equivalent to the sum allowed the receiver and trustee.¹³

The standards which prevail in bankruptcy courts indicate the purpose of the Bankruptcy Act to administer the estate of the bankrupt economically.¹⁴

The receiver will, however, be allowed by the court a reasonable fee commensurate with the services rendered to the estate of the bankrupt, the amount to be determined by the court at its discretion.¹⁵

⁹ United States Bankruptcy Act, as amended 1910, sec. 48(d). See *In re Charles Knosher & Co.* (1912), 197 Fed. 136, at 143; *In re Falkenberg* (1913), 206 Fed. 835, at 837.

¹⁰ Act of Bankruptcy of 1898, amended 1903 and 1910, sec. 48(d).

¹¹ Act of Bankruptcy of 1898, amended 1903 and 1910, sec. 48(e).

¹² Bankruptcy Act of July 1, 1898, sec. 64b, subsec. (3).

¹³ *In re Charles Knosher & Co.* (1912), 197 Fed. 136, at 143.

¹⁴ *In re Wood & Henderson* (1907), 210 U. S. 246, at 252, 52 L. ed. 1046.

¹⁵ *In re Charles Knosher & Co.* (1912), 197 Fed. 136, at 143; *In re T. E. Hill Co.* (1907), 159 Fed. 73, at 77.

The first consideration is, was the receiver empowered by the court to employ the attorney and was the receiver appointed to act as general receiver, as mere custodian or as receiver to carry on the business of the bankrupt?

(a) **Attorney for General Receiver.** A general receiver who employed an attorney who petitioned for and obtained the appointment of appraiser, drew up and filed schedules, saw to the setting aside by the receiver of the bankrupt's exemption, which was allowed under bond, petitioned for and obtained an order for a private sale of the bankrupt's stock and made due return thereof, appearing also in opposition to exceptions, filed and finally drew up and filed the receiver's account, was allowed \$180 attorney fee, the estate passing through the hands of the receiver amounting to \$4,200.¹⁶

(b) **Attorney for Mere Custodian.** The attorney for a receiver in bankruptcy who is a mere custodian has generally little services to perform,¹⁷ and his fees will be according to his services rendered.

(c) **Attorney for Receiver Carrying on Business of Bankrupt.** Special provision is made in the Bankruptcy Act for the allowance of additional compensation to trustees, marshals or receivers by sec. 48e of the Bankruptcy Act of 1898 as amended February 5, 1903, and June 25, 1910. If receivers receive extra compensation for such services, it naturally follows that attorneys for the receivers, when they perform services which are beneficial to the estate and business being conducted by the receiver, should receive fees commensurate with such services.

§ 426. Payment of Fees and Expenses of Receiver in Bankruptcy by Creditors. When the district court has jurisdiction of the parties and the subject-matter, it may determine whether or not the business of the alleged bankrupt, if a corporation, is such as to bring it within the class of corporations subject to an adjudication in bankruptcy.¹⁸

¹⁶ In re Oppenheimer (1906), 146 Fed. 140, at 141.

¹⁸ Allonwood Park Co. v. Gwynne, 160 Fed. 448.

¹⁷ In re Leonard (1910), 177 Fed. 503, at 507.

If the district court had jurisdiction of the controversy, it had power to appoint a receiver. But if the corporation was such as its business was not subject to the Bankruptcy Act, and there is nothing to show that it was absolutely necessary for the preservation of the estate that a receiver be appointed, then the creditors who have insisted upon this unnecessary appointment should pay the expenses of the receivership.¹⁹

When petitioning creditors apply for and obtain the appointment of a receiver and the proceeding is subsequently dismissed as unfounded, the receiver meanwhile having entered upon his duties, taken charge of the property and incurred expense, the court may, in the absence of any statutory authority, order the petitioning creditors to bear the expense.²⁰

¹⁹ In re Wentworth Lunch Co. (1911), 191 Fed. 821.

²⁰ In re Lacov (1905), 142 Fed. 960; In re T. E. Hill Co. (1907), 159 Fed. 73, at 76.

CHAPTER XVIII

FOREIGN AND ANCILLARY RECEIVERS

ANALYSIS

§ 427. Extraterritorial Power and Authority of Receiver.

- (a) Equitable Receiver No Absolute Right to Sue in Foreign State.
- (b) Equitable Receiver May Sue in Foreign State by Comity.
- (c) Receiver when Quasi-Assignee Has Extraterritorial Power.
- (d) Ohio Rule as to Extraterritorial Power of Receiver.
- (e) By Federal Practice Receiver Can Not Sue in Foreign Jurisdiction.
- (f) Receiver with Conveyance of Property to Him May Sue in Foreign Jurisdiction.

§ 428. Ancillary Receiver.

§ 429. Appointment of Ancillary Receiver.

§ 430. Ancillary Receiver in Federal Courts.

§ 431. Distribution by Ancillary Receiver.

Preference to Domestic Creditors.

§ 432. Powers and Duties of Ancillary Receiver.

Statutory and Other Rights Sometimes Enforced Ex Comitatus.

§ 433. Receiver of Foreign Corporation Can Not Wind Up Corporation.

§ 427. Extraterritorial Power and Authority of Receiver.

The court of one state has no jurisdiction or power to act directly on property within another state or sovereignty. Can a receiver, the arm of the court, go out of the state wherein he was appointed and act in that other state by virtue of his original appointment? The leading case of *Booth v. Clark*¹ fixed the law in the United States courts that a receiver has no extraterritorial power of official action, none which the court appointing him can confer with authority to enable him to go into a foreign jurisdiction and take possession of the debtor's property.

¹ *Booth v. Clark* (1854), 17 How. 322, 15 L. ed. 164; *Harvey v. Varney* (1870), 104 Mass. 436, at 443.

This case has been repeatedly followed in the United States courts and in most of the state courts to date.²

The reason of the rule is that the title to the property is not in the receiver. All the rights in the property which the receiver has are by reason of the sovereign power through the courts taking custody of the property and making the receiver the representative of this sovereign power. This sovereign power does not extend beyond the confines of the state in which receiver is appointed.³

The cogent reasons for this rule given by Wayne, J., in *Booth v. Clark*, just referred to are as follows:

We think that a receiver could not be admitted to the comity extended to judgment creditors without an entire departure from chancery proceedings, as to the manner of his appointment, the securities which are taken from him for the performance of his duties and the direction which the court has over him in the collection of the estate of the debtor and the application and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability. All that could be done upon such an application from a receiver, according to chancery practice, would be to transfer him from the locality of his appointment to that where he asks to be recognized, for the execution of his trust in the last, under the coercive ability of that court, and that it would be difficult to do, where it may be asked to be done without the court exercising its province to determine whether the suitor or another person within its jurisdiction was the person to act as receiver."

² *Hale v. Allinson* (1902), 188 U. S. 56, 47 L. ed. 380; *Coal & Iron Co. v. Reherd* (1913), 204 Fed. 859; *Great Western Mining & M. Co. v. Harris*, 198 U. S. 561, 49 L. ed. 1163; *Fairview Fluor Spar & L. Co. v. Ulrich* (1911), 192 Fed. 894; *Second Nat. Bk. v. W. C. Sterrett, Receiver*, decided by U. S. Cir. Ct. of Appeals, 6th Cir., Dec. 4, 1917;

Seaboard Air Line Ry. v. Burns (1915), 86 S. E. 270; *Linville v. Hadden*, 88 Md. 594, 41 Atl. 1097. See 43 L. R. A. 223, and 4 L. R. A. (N.S.) 824. *Contra*, *Bank v. McCloud* (1882), 38 O. S. 174.

³ *Baltimore Building & Loan Assn. v. Alderson* (1898), 90 Fed. 142, at 146.

(a) **Equitable Receiver No Absolute Right to Sue in Foreign State.** Unless the receiver appointed in one state has title to the property by voluntary transfer from the owner⁴ or is a quasi-assignee by force of some state statute, he has no absolute right under the United States constitution⁵ to bring a suit in his official capacity in a state other than the state wherein he was appointed.⁶

(b) **Equitable Receiver May Sue in Foreign State by Comity.** Although an equitable receiver may have no absolute right to bring an action in a foreign state, nevertheless such a receiver may be allowed to sue in a foreign state upon principles of comity.⁷

The question of a foreign receiver's rights in the state of New York is exhaustively gone into in a recent New York case⁸ and long list of cases there cited.

Van, J., says: "While the laws of a foreign state have no force as such in this state, still our courts uphold the title of

⁴ Graydon v. Church, 7 Mich. 36; Iglehart v. Bierce, 36 Ill. 133.

⁵ United States Court, art. IV, sec. 1.

⁶ Booth v. Clark, 17 How. 322, 15 L. ed. 164; Quincy M. & P. Ry. v. Humphreys, 145 U. S. 82, 36 L. ed. 632; Hale v. Allinson, 188 U. S. 56, at 64, 47 L. ed. 380; Great Western Min. Co. v. Harris (1904), 198 U. S. 561, 49 L. ed. 1163; Fowler v. Osgood (1905), 141 Fed. 20, 4 L. R. A. (N.S.) 824; Hazlett v. Woodhead (1907), 28 R. I. 452, 67 Atl. 736; Hardee v. Wilson (1914), 129 Tenn. 511, at 513, 167 S. W. 475; Bank v. Motherwell Iron, etc. (1895), 95 Tenn. 172, at 182, 31 S. W. 1002. See Hope Mut. L. Ins. Co. v. Taylor (1864), 2 N. Y. Sup. Ct. R. 278; Kronberg v. Elder, 18 Kan. 150; Farmers & M. Ins. Co. v. Needles, 52 Mo. 17; Brigham v. Luddington, 12 Blatchf. 237; Hazard v. Durant, 19 Fed. 471; Day v. Postal Tel. Co., 66 Md. 354, 7 Atl. 608; Filkens v. Nunne-macher, 81 Wis. 91, 51 N. W. 79.

⁷ Hazlett v. Woodhead (1907), 28 R. I. 452, 67 Atl. 737; Edwards v. National Window Glass Job Assn.

(1908), 68 Atl. 800; Falk v. Janes, 49 N. J. Eq. 484, at 489, 23 Atl. 813; Irwin v. Granite State P. Assn., 56 N. J. Eq. 244, 38 Atl. 680; Kirtley v. Holmes (1901), 107 Fed. 1, at 9; Howarth v. Angle, 162 N. Y. 179, 56 N. E. 489; Howarth v. Lombard (1900), 175 Mass. 570, 56 N. E. 888; Howarth v. Ellwanger, 86 Fed. 54; Hale v. Haddon, 95 Fed. 747. See cases discussed in 4 L. R. A. (N.S.) 824. See also National Bank v. McCloud, 38 O. S. 174; Boulware v. Davis, 90 Ala. 207, 8 So. 84, 9 L. R. A. 601; Lycoming F. Ins. Co. v. Wright, 55 Vt. 526; McAlpin v. Jones, 10 La. Ann. 552; Hurd v. Elizabeth, 41 N. J. L. 1, 2 Atl. 453; National Trust Co. v. Miller, 33 N. J. Eq. 155; Bidlack v. Mason, 26 N. J. Eq. 230; Dyer v. Power, 39 N. Y. St. R. 136, 14 N. Y. Sup. 873; Peters v. Foster, 56 Hun. 607; Metzner v. Bauer, 98 Ind. 427; Pugh v. Hurtt, 52 How. Pr. 22; Runk v. St. John, 29 Barb. 585; Sobernheimer v. Wheeler, 45 N. J. Eq. 614, 18 Atl. 234.

⁸ Mabon v. Ongley Electric Co. (1898), 156 N. Y. 196, at 201, 50 N. E. 805.

a foreign assignee or receiver upon the principle of comity. If the title is by virtue of a voluntary conveyance or transfer, it is sustained as against all, including even domestic creditors, but if it depends on a foreign statute or judgment, it is sustained against all except domestic creditors. Subject to their superior right, the plaintiff (foreign receiver) can reduce to possession all the property of the defendant in this state and can bring replevin for the purpose or trover to recover damages for conversion.”

“In *Milletts v. Waite*⁹ Allen, J., discusses the power of an Ohio receiver of an Ohio bank collecting assets in New York state and his rights against lien creditors in New York, which liens had attached subsequent to the appointment of receivers in Ohio. The Ohio receivers were appointed under State Bank Law of February 24, 1845.¹⁰

“The legislature of Ohio assumed the disposition of property of the insolvent bank in invitum and undertook to vest the title in the receivers, but this statutable conveyance can not operate upon any subject not within the territorial limits of Ohio. It is none the less a conveyance in invitum because the authority for the proceeding was a part of the organic law of the corporation. It was, nevertheless, a proceeding in the nature of a proceeding in bankruptcy. The acceptance of the charter with this provision for a distribution of its effects upon the happening of insolvency, can not operate to give to the transfer the effect of a voluntary conveyance of the assets. The title of the trustees is a statutory title and must defer to the lien acquired by the creditors attaching the property in the state of New York. Creditors within the state of New York having acquired a lien under the laws of New York upon property within the state of New York, will not be deprived of their lien and sent to a foreign state to seek such portion of the insolvent estate as the laws of that state will, upon distribution, give them. The state of New York will do justice to its

⁹ *Willetts v. Waite* (1862), 25 N. Y. 587. ¹⁰ 43 Ohio Laws 24.

own citizens so far as it can be done by administering upon property within its jurisdiction, and will yield to comity in giving effect to foreign statutory assignments only so far as may be done without impairing the remedies or lessening the securities which our laws have provided for our own citizens. (Story in Conflict Laws, sec. 414.)

Today most state statutes of distribution purport to transfer the title to property of a dissolved corporation to the receiver appointed in accordance with such statutes. Such a receiver in New York could not well stand on a better footing than the receiver just referred to in *Willetts v. Waite*.

It is impossible in this work to discuss the rights of a foreign receiver in every state in the Union. In some it will be found that he has a standing in court to sue. In other states, where the rulings follow the federal courts, an ordinary chancery receiver would not have a right to sue at all. In such cases a local ancillary receiver must be appointed. In such a case such local ancillary receiver could not defeat liens acquired locally after the primary receiver had been appointed, but before the local receiver had been appointed.

(c) Receiver when Quasi-Assignee Has Extraterritorial Power. In *Converse v. Hamilton*¹¹ the Supreme Court of the United States has reviewed *Booth v. Clark*, and a receiver of a Minnesota corporation was allowed to sue in the courts of another state to recover the double liability imposed by the laws of Minnesota, the court saying: "While an ordinary chancery receiver can not exercise his powers in jurisdiction other than that of the court appointing him, except by comity, one who is a quasi-assignee and invested with the rights of his *cestuis que trustent* may sue in other jurisdictions, and his right to do so is protected by the full faith and credit clause of the federal constitution."

The reasoning in which this case is decided is to be found in *Relfe v. Rundle*,¹² wherein Mr. Chief Justice Waite says: "We

¹¹ *Converse v. Hamilton* (1911),
224 U. S. 243, 56 L. ed. 749.

¹² *Relfe v. Rundle* (1880), 103
U. S. 222, at 225, 26 L. ed. 337.

are aware that, except by virtue of some statutory authority, an administrator appointed in one state can not generally sue in another, and that a receiver appointed by a state court has no extraterritorial power; but a corporation is the creature of legislation, and may be endowed with such powers as its creator sees fit to give. Necessarily it must act through agents, and the state which creates it may say who those agents shall be. One may be its representative when in active operation and in full possession of its powers, and another if it has forfeited its charter and has no lawful existence except to wind up its affairs.”¹³

In these cases, where the receiver was held to be a quasi-assignee, the receiver was given certain rights by the statute creating the corporation, and he became a representative of the creditors, was invested with their rights of action against the stockholders and was charged with the enforcement of those rights in the courts of that state and elsewhere. When they proceeded to invoke the aid of the courts to collect the statutory double liability against creditors, the case presented was in substance that of a trustee clothed with adequate title for the occasion seeking to enforce for the benefit of his cestui que trust a right of action transitory in character against one who was liable contractually and severally if at all.

The recognition of such a receiver or quasi-assignee in a foreign state was held¹⁴ in the above cases to come within the clause of the constitution of the United States requiring “Full faith and credit shall be given in such state to the public acts, records and judicial proceedings of every other state.”¹⁵ Under the full faith and credit clause, the courts of one state are bound to give full faith and credit to laws of another state, making a receiver the representative of the corporation to wind it up, and giving title to the receiver in such a case, and the

¹³ *Relfe v. Rundle* (1880), 103 U. S. 222, 225, 26 L. ed. 337.

¹⁴ *Converse v. Hamilton* (1911), 224 U. S. 240, at 260, 56 L. ed. 749.

¹⁵ United States Court, art. IV, sec. 1.

state must also give full faith and credit to the judicial proceedings of that first state establishing such title in the receiver and giving him power to sue.¹⁶

Although by the first section of Art. IV, constitution of the United States, and Act of Congress, May 26, 1790, as between the different states, full faith and credit are to be given in all the courts of the United States to the judicial sentences of the different states, a receiver, under a creditor's bill (and a chancery receiver generally) has not as yet been an actor as such in a suit out of the state in which he was appointed.¹⁷

However, a receiver appointed by a state court for a corporation organized under the state laws may sue in a circuit court of the United States for another state on a judgment obtained in the state court upon promissory notes, as in such case he sues, not as receiver, but as a judgment creditor.¹⁸ In such case the receiver is the actor, and, having a judgment, full faith and credit must be given to such a judgment.

(d) Ohio Rule as to Extraterritorial Power of Receiver. In Ohio is found the case of *Bank v. McLeod*,¹⁹ in which the Ohio Supreme Court calls "dicta" those remarks in *Booth v. Clark*, viz: "That the receiver's right to the possession of the property is limited to the jurisdiction of his appointment." In *Bank v. McLeod* the court permits a Kentucky receiver to come over into Ohio, bring an action in his own name and assert his right to possession of certain chattels, "where such right is not in conflict with the rights of our own citizens nor against the policy of our laws."

In *Leman v. MacLennan*,²⁰ Cuyahoga Circuit Court in 1905, refused to apply the doctrine of *Bank v. McLeod* beyond the special facts stated therein, followed *Booth v. Clark*, and held that "In an action by a receiver of a foreign corporation to

¹⁶ *Converse v. Hamilton* (1911), 224 U. S. 243, at 261, 56 L. ed. 749.

¹⁷ *Booth v. Clark* (1854), 17 How. 331, at 338, 15 L. ed. 164.

¹⁸ *Wilkinson v. Culver* (1885), 25 Fed. 639.

¹⁹ *Bank v. McCloud* (1882), 38 O. S. 174.

²⁰ *Leman v. MacLennan* (1905), 18 Ohio D. 137, 28 Ohio C. C. 137.

enforce a stockholder's liability in this state, in the absence of some conveyance or statute vesting the title to the corporate assets and property in him, he can not be empowered by such court to sue in a foreign jurisdiction either in his own name or in that of the corporation to realize its assets."

Bank v. McLeod follows with approval Hurd v. City of Elizabeth, 41 N. J. L., where the case of Booth v. Clark and the point at issue is exhaustively reviewed. In Barbour v. Lockhard, 9 Ohio D. Rep. 254, Peck, J., of the Superior Court of Cincinnati, quotes Bank v. McLeod and Hurd v. City of Elizabeth, explains them and follows them.

A careful study of Booth v. Clark,²¹ Great Western Min. & Mfg. Co. v. Harris,²² discloses that the doctrine therein followed is logical and is the undoubted law in the federal courts. The court, in the decision of Bank v. McLeod, although it apparently wished to distinguish Booth v. Clark, nevertheless seemed to decide squarely against it. Until the Supreme Court of Ohio reverses itself, we would take it that Bank v. McLeod is the law of Ohio. Yet a careful reading of Lennan v. MacLennan shows that the Circuit Court of Cuyahoga county has refused to follow Bank v. McLeod. In view of these conflicting authorities, it would seem the part of wisdom for a foreign receiver, coming into Ohio, to proceed to collect assets in Ohio, by securing the appointment of a local ancillary receiver.

(e) By Federal Practice Receiver Can Not Sue in Foreign Jurisdiction. As far as federal courts are concerned a chancery receiver appointed by a court in one jurisdiction can not sue in a court of another jurisdiction, as a matter of right, and furthermore, he can not sue as a matter of comity, even though the leave be given in the court where the property lies.

A receiver in chancery of an insolvent corporation appointed by the United States Circuit Court for the Southern District of Iowa, being authorized thereto by the court appointing him, brought suit in equity in the United States Circuit Court for

²¹ Booth v. Clark (1854), 17 How. 322, 15 L. ed. 164.

²² Great Western Min. Co. v. Harris (1904), 198 U. S. 561, 49 L. ed. 1163.

the District of Colorado for the recovery of a fund, from a resident of the latter state, alleged to be held in trust for the benefit of creditors of the estate. Held that such receiver had no legal status to maintain such suit in a jurisdiction foreign to that appointing him, even though leave to institute such suit was granted by the Colorado court, and although the bill alleged that there were no creditors of the insolvent corporation in the state of Colorado.²³

A receiver appointed by a federal court of one district has no power to take possession of property in another district, and his appointment for that purpose does not affect the right or power of the court in the district where the property is to take possession of the same through its own receiver.²⁴

(f) Receiver with Conveyance of Property to Him May Sue in Foreign Jurisdiction. It was early held²⁵ when a receiver was appointed in a creditor's suit over property of the defendant, whether with or without property he, the defendant, might be compelled to make a formal assignment to the receiver, even though he had sworn that he had no property.

When a receiver by assignment has title to the property, he represents that property in a stronger capacity than a mere chancery receiver; he is an actor in the meaning of *Booth v. Clark*, 17 How. 321, at 329, and may be permitted to sue in a foreign jurisdiction.²⁶

§ 428. Ancillary Receiver. It is true that a court of equity sitting in one state and having jurisdiction of the person may decree a conveyance by him of land in another state;²⁷ the decree of the court, however, without a conveyance by the

²³ *Fowler v. Osgood* (1905), 141 Fed. 70, 4 L. R. A. (N.S.) 824.

²⁴ *Morrit v. American Res. B. Co.* (1907), 151 Fed. 385.

²⁵ *Booth v. Clark* (1854), 17 How. 321, at 339, 58 U. S. 321, at 339, 15 L. ed. 164; *Chipman v. Sabbaton* (1838), 7 Paige (N.Y.) 47; *Fitzburgh v. Everingham* (1836), 6 Paige 29.

²⁶ *Great Western Min. Co. v. Harris* (1904), 198 U. S. 561, at 576, 49 L. ed. 1163; quoting *Hawkins v. Glenn* (1888), 131 U. S. 319, 38 L. ed. 184. See *Graydon v. Church*, 7 Mich. 36; *Iglehart v. Bierce*, 36 Ill. 133.

²⁷ *Muller v. Dows* (1876), 94 U. S. 444, 24 L. ed. 207.

party ordered to convey, will not be effective in the other state. A decree appointing a receiver, therefore, in one state will not of itself bind property in another state. The only way the receiver of one state can get the custody or title of property in another state is by conveyance by the defendant to the receiver or by the receiver going to the other state and being appointed by the courts of that state ancillary receiver of property of the defendant in that state. The laws of most states, however, limit receivers to residents of the state. Every jurisdiction in which it is sought by means of a receiver to subject property to the control of the court has the right and power to determine for itself who the receiver shall be, and make such distribution of the funds realized within its own jurisdiction as will protect the rights of local parties interested therein,²⁸ and not permit a foreign court to prejudice the rights of local creditors by removing assets from the local jurisdiction without an order of the court or its approval as to the officer who shall act in the holding and distribution of the property recovered.²⁹ It is, therefore, generally necessary to have a resident of the state where the assets are found made receiver of the assets in that state.³⁰

Where a receiver is once appointed by a federal court, other federal courts, through comity, will usually appoint the same person as receiver of the assets within their jurisdiction. It is no unusual thing for a federal court to appoint an ancillary receiver of assets within its jurisdiction in aid of a primary appointment by a state court of another state.³¹

§ 429. Appointment of Ancillary Receiver. When the administration extends over assets located in several jurisdictions,

²⁸ *Great Western Min. Co. v. Harris* (1904), 198 U. S. 561, 49 L. ed. 1163; *Thornley v. J. C. Walsh Co.* (1908), 200 Mass. 179, 86 N. E. 355; *Thornley v. J. C. Walsh Co.* (1910), 207 Mass. 62, at 66, 92 N. E. 1007.

²⁹ *Great Western Min. Co. v. Harris* (1904), 198 U. S. 561, 49 L. ed. 1163; *Fowler v. Osgood* (1905), 141

Fed. 20; *Morrill v. American Res. B. Co.* (1907), 151 Fed. 305.

³⁰ *Lowe v. R. P. K. Pressed Metal Co.* (1916), Conn. Sup. Ct. of Errors, 99 Atl. 1.

³¹ *Shinney v. North American Co.* (1899), 97 Fed. 9, at 11; *Sands v. E. S. Greeley & Co.* (1898), 31 C. C. A. 424, 88 Fed. 130.

it is often convenient to apply, in advance, for the assistance of the different courts; hence the practice has become common of applying for auxiliary or ancillary appointments. When such an application is made, the court to which it is addressed exercises its own original jurisdiction. The decree in the court of the domicile of the corporation is evidence in every other state that the corporation is insolvent, or of such other facts as the appointing found and that a proper case exists in that state for the appointment of a receiver, and it is to be respected accordingly in obedience to the constitutional provision whereby full faith and credit is to be given in each state to the record and judicial proceedings of every other state in the Union. But it is for the court to which the application is made to decide what remedy it should extend in the particular case, and whether the proper administration of the assets requires the appointment of a receiver. Ordinarily in comity to the proceedings of another court of co-ordinate jurisdiction, it will appoint an ancillary receiver and assume administration in aid of the primary receiver. When it appoints a receiver, the officer becomes its officer, and is completely amenable to its control, and it matters not whether he is called an ancillary receiver or merely a receiver.³²

Where a receiver is not a quasi-assignee as contemplated in *Bernheimer v. Converse*,³³ or has not title to the property by assignment or otherwise, or where, because of local policy or the rights of local creditors, the rule permitting a receiver to sue in a jurisdiction other than the one in which he was appointed is not deemed applicable, a bill may be filed for the appointment of an ancillary receiver, and, on a proper showing, such a receiver will be appointed. In any such case the jurisdiction is analogous to that of a court appointing a receiver on a proper bill in a suit ancillary to another suit or action pending in the same court.³⁴

³² *Sands v. E. S. Greeley & Co.* (1898), 88 Fed. 130, at 133.

³³ *Bernheimer v. Converse* (1906), 206 U. S. 516, 51 L. ed. 1163.

³⁴ *Bluefield's S. S. Co. v. Steele* (1911), 184 Fed. 587.

In a suit strictly ancillary to another suit pending in the same court, no subpoena ad respondendum is necessary. The parties are already in court. The service of a rule or of notice is all that is required to enable the court to proceed with the ancillary suit.

So where a defendant has been regularly brought into court in an original suit and a receiver of her property has been appointed in that suit, another court, whose jurisdiction is invoked in aid of the original receivership, may proceed on the service of a rule or notice merely.

Said Lanning, C. J., as follows: "Having once been brought into a court which has regularly acquired jurisdiction of his person in an original suit, and having there had a decree entered against him appointing a receiver to take possession of all his property wherever situate, the court in which the appointment of an ancillary receiver is sought will take jurisdiction of his person, upon the service of a rule or notice, precisely as if the original suit were pending in that court. Otherwise the prevailing practice in the federal courts of appointing ancillary receivers in railroad and other cases of insolvent corporations whose property extends through or exists in different judicial districts and states is wrong. While an ancillary proceeding of the kind here considered will be controlled by the court before which it is prosecuted, and in that sense is an independent proceeding, its ultimate object is to aid the purpose of the original suit, and in that sense it is ancillary. Jurisdiction in such an ancillary suit, therefore, no more depends on diversity of citizenship than it does in a suit ancillary to an original suit pending in the same court. It depends alone on the existence of an original suit in one court, which may properly be aided by proceedings in another court." ³⁵

Says Sanborn, C. J., in *Rust v. United Waterworks Co.*: ³⁶
"It goes without saying that the court below (United States District Court of Colorado) had the power, upon the presen-

³⁵ *Bluefield's S. S. Co. v. Steele* (1911), 184 Fed. 587.

³⁶ *Rust v. United Waterworks Co.* (1895), 70 Fed. 129, at 133.

tation to it of the decree of the court of chancery of the state of New Jersey appointing the plaintiff in error the receiver of the property of this insolvent corporation and the trustee for its creditors and stockholders, to appoint him a receiver and trustee with the same powers in the district of Colorado and to authorize him to sue for and defend suits against the water-works company in that district in the name of the corporation or in his own name."

§ 430. Ancillary Receiver in Federal Courts. As far as the federal courts are concerned, the only method for reaching the property or assets of an insolvent corporation in a jurisdiction foreign to that when the receiver in chancery is appointed is by resort to an ancillary receivership where the property or assets sought to be recovered has its situs or where the debtor resides. The leave granted to sue by the appointing court or even by the court where the assets were found determine nothing as to the power of a foreign receiver to maintain the suit when brought. Such leave would not have the effect of controlling any fund by that court the receiver might recover in the suit. The receiver is under no bond of accountability to that court. The permission to sue, therefore, is, in legal effect, meaningless.³⁷

Where a receiver is once appointed by a federal court, other federal courts through comity will usually appoint the same person as receiver of the assets within their jurisdiction.³⁸ It is no usual thing for a federal court to appoint an ancillary receiver of assets within its jurisdiction in aid of a primary appointment by a state court of another state.³⁹

When a receiver appointed in the original jurisdiction has not the character of a quasi-assignee permitting him to sue in foreign jurisdictions,⁴⁰ or where because of local policy or the

³⁷ *Fowler v. Osgood* (1905), 141 Fed. 20, at 24.

³⁸ *Shinney v. N. A. S. L. & B. Co.* (1899), 97 Fed. 9, at 11.

³⁹ *Shinney v. N. A. S. L. & B. Co.*

(1899), 97 Fed. 9, at 11, quoting *Sands v. E. S. Greeley & Co.* (1898), 88 Fed. 130.

⁴⁰ *Bernheimer v. Converse*, 206 U. S. 516, 51 L. ed. 1163.

rights of local creditors the rule permitting a receiver to sue in a jurisdiction other than the one in which he was appointed is not deemed applicable, a bill may be filed for the appointment of an ancillary receiver, and, on a proper showing, such receiver will be appointed. In any such case the jurisdiction is analogous to that of a court to appoint a receiver on a proper bill in a suit ancillary to another suit or action pending in the same court, etc.⁴¹

§ 431. Distribution by Ancillary Receiver. The right of an ancillary receiver to the assets of the defendant with the jurisdiction of the court appointing the ancillary receiver is derived from the decree of the court appointing the ancillary receiver, and does not depend upon comity. The assets are in its custody and are to be disposed of as equity and the orderly administration of justice require. Its judgments and decrees in respect to these assets must be accepted as conclusive by all other courts. It rests in the discretion of the court appointing the receiver whether the assets within its jurisdiction shall be distributed under its own direction or shall be transmitted to the primary receiver.⁴²

All the claims within the jurisdiction of the court appointing the ancillary receiver should be first paid,⁴³ because "Where a receiver, administrator, or other custodian of an estate is appointed by the court of one state, the courts of that state reserve to themselves full and exclusive jurisdiction over the assets of the estate within the limits of the state."⁴⁴ It has been said, however, that 'Courts of justice make no distinction between foreign and domestic creditors when their claims are of equal validity.' "⁴⁵

⁴¹ Bluefield's S. S. Co. v. Steele (1911), 184 Fed. 584, at 587.

⁴² Sands v. E. S. Greeley & Co. (1898), 88 Fed. 130, at 133; Mackey v. Coxe (1855), 18 How. 100, at 105, 15 L. ed. 299.

⁴³ See Pfahler v. McCrum-Howell Co. (1912), 197 Fed. 684.

⁴⁴ Reynolds v. Stockton (1891), 140 U. S. 254, 35 L. ed. 464; Sands v. E. S. Greenley & Co. (1898), 88 Fed. 130, at 133.

⁴⁵ Sands v. E. S. Greeley & Co. (1898), 88 Fed. 130, at 133.

A creditor of a foreign corporation can maintain an ancillary petition against it in the courts of a state in spite of the fact that such foreign corporation had not complied with certain state statutes⁴⁶ by appointing some one upon whom service could be had. Such an ancillary receiver will not be allowed to transmit property or funds to the original receiver in another state until provision is made for payment of attaching creditors in the state in which the ancillary receiver has been appointed.⁴⁷

Preference to Domestic Creditors. Preference will not be given to domestic creditors unless it appears that there is danger of discrimination against them in the forum of the principal receivership, and then only so far as is necessary to counteract such discrimination.⁴⁸

In ancillary receivership proceedings against a foreign corporation with assets in the state where ancillary proceedings are had, it is proper for the court appointing such ancillary receiver in order to secure equality of distribution among all creditors to allow foreign creditors to prove their claims in the court appointing the ancillary administrator just as domestic creditors may go to the state where original administration was taken out.⁴⁹ Preference will be given, however, to domestic creditors in the court appointing the ancillary administrator if it appears that there is danger of discrimination against them in the forum of the original receivership and then only so far as is necessary to counteract such discrimination.⁵⁰

Under the statutes of Massachusetts,⁵¹ an attachment is dissolved by the appointment of a receiver of the debtor's property. This statute while compelling the attaching cred-

⁴⁶ Statutes of Mass. (1903), ch. 437, sec. 58.

⁴⁷ *Thornley v. J. C. Walsh Co.* (1908), 200 Mass. 179, 86 N. E. 355.

⁴⁸ *Thornley v. J. C. Walsh Co.* (1910), 207 Mass. 62, 92 N. E. 1007.

⁴⁹ *Garham v. Mutual Aid Society*, 161 Mass. 357, 37 N. E. 447; *Thorn-*

ley v. J. C. Walsh Co. (1910), 207 Mass. 62, at 66, 92 N. E. 1007.

⁵⁰ *Thornley v. J. C. Walsh Co.* (1910), 207 Mass. 62, at 66, 92 N. E. 1007; *Thornley v. J. C. Walsh Co.* (1908), 200 Mass. 179, 86 N. E. 355.

⁵¹ Massachusetts R. L., ch. 167, sec. 126.

itor to share with all other creditors who avail themselves of the receivership, it secures to such attaching creditor the right to have the property distributed through the receivership that deprives him of his attachment unless his debt is otherwise secured under the statute and a remission of the assets to the original receiver in another state will not be allowed of prejudicing the attaching receiver.⁵² Neither should such remission be allowed if it would be a discrimination against any nonattaching domestic creditor.⁵³

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§ 432. Powers and Duties of Ancillary Receivers. Said Dickinson, D. J., Eastern District of Pennsylvania, 1914: "As a general rule the ancillary proceedings are well confined to conserving the property of the corporation within the jurisdiction of the court and transmitting the moneys into which it may be converted for distribution in the original proceedings."⁵⁴

Statutory and Other Rights Sometimes Enforced Ex Comitate. Where a receiver has not the character of quasi assignee, or where because of the local policy or the rights of local creditors the rule of comity does not apply and a bill is generally filed for the appointment of an ancillary receiver.⁵⁵ In such a case such ancillary receiver has only the rights and duties involving upon him by appointment, he is responsible first to the court which appointed him.

§ 433. Receiver of Foreign Corporation Can Not Wind Up Corporation. A corporation is the creature of the sovereignty creating it. Only the sovereign creating it can destroy it. The statutory law of one state has no binding force on the

⁵² Second National Bank v. Lappe Tanning Co. (1908), 198 Mass. 159, at 162, 84 N. E. 301.

⁵³ Thornley v. J. C. Walsh Co. (1910), 207 Mass. 62, 92 N. E. 1007.

⁵⁴ Way v. J. H. Way & Sons Co. (1914), 216 Fed. 719.

⁵⁵ Bluefield's S. S. Co. v. State (1911), 184 Fed. 584, at 587; Sands v. E. L. Greeley & Co. (1898), 88 Fed. 130, at 133; Mackey v. Cox (1855), 18 How. 100, at 105, 15 L. ed. 299. See Pfahler v. McCrum, etc., (1912), 197 Fed. 684.

citizens and property within another state.⁵⁶ Courts of a foreign state therefore can not either by their general equity powers or even by statute of their sovereign state destroy the creature of another sovereignty.⁵⁷

Nevertheless, when an individual or a corporation, citizens and creatures of one state, send their property or acquire property within another jurisdiction, and sovereignty, they submit such property, whether they want to or not to the laws in force in such new sovereignty or jurisdiction.⁵⁸ "What the law protects it has a right to regulate."⁵⁹ Such foreign state may take possession of and subject the assets of a foreign corporation to the payment of claims of domestic creditors,⁶⁰ but it can not destroy the entity of the corporation.

⁵⁶ See matter discussed at length in ch. III, *supra*, and see *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301, at 304. Also *Holschouser Co. v. Gold, etc.* (1905), 138 N. C. 248, 50 S. E. 650, 70 L. R. A. 183.

⁵⁷ *Lowe v. R. P. K. Pressed Metal Co.* (1916), 99 Atl. 1, Conn. Sup. Ct. of Errors.

⁵⁸ *Holschouser Co. v. Gold, etc.* (1905), 138 N. C. 248, 50 S. E. 650, 70 L. R. A. 183.

⁵⁹ *Oliver v. Tonnes*, 2 Mart. La. (N.S.) 93.

⁶⁰ *Thornley v. J. C. Walsh Co.* (1908), 200 Mass. 175, 86 N. E. 355; *Thornley v. J. C. Walsh Co.* (1910), 207 Mass. 62, at 66, 92 N. E. 1007.

CHAPTER XIX

EFFECT OF APPOINTMENT OF RECEIVER GENERALLY

ANALYSIS

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§ 459. Effect of Appointment of Receiver on Creditor's Claims.**§ 460. Effect of Appointment of Receiver on Outstanding Checks.****§ 461. Effect of Appointment of Receiver on Lien on Bank Deposits.**

§ 434. Effect of Appointment of Ordinary Receiver. The effect of the appointment of a receiver "is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it; and when the party entitled to the estate has been ascertained, the receiver will be considered his receiver."¹

The relation of the defendant company and the receiver is that of owner and caretaker.² The receiver is an occupier in the sense of caretaker.³

"If a party claiming a right in the same subject-matter was in possession of the rights which he claimed at the time the receiver was appointed, the appointment of the receiver

¹ Wiswall v. Sampson, 14 How. 64, 14 L. ed. 322; cited in In re John L. Nelson & Bro., 149 Fed. 590; Johnson v. Garner (1916), 233 Fed. 756, at 776, and cases cited.

² Patterson v. Gas Light, etc. (1896), 11 Ch. D. 476, at 483 C. A.

³ In re Smith lease (1893), 1 Q. B. 323.

left him in such possession, if on the other hand, the claimant was out of possession, he must apply for leave of the equity court before he institutes any legal proceedings affecting the possession which the receiver had acquired.”⁴

A court when it makes an order appointing a receiver is not foreclosed from considering and determining equitably, whether there are still further claims or liabilities which should have been provided for in the original order.⁵ In other words an order appointing a receiver is interlocutory and the parties in interest may still challenge the priority of a payment authorized by the order appointing a receiver particularly when the receiver has not yet acted and made a payment according to the order appointing him.

§ 435. Effect of Appointment of Receiver to Collect Annuities. The principle on which the court appoints a receiver to collect an annuity is this: “Where a plaintiff in his bill represents that he has only an equitable estate, which consequently, does not entitle him to recover at law, if it be clear that he has an equitable estate, on which he will recover in equity the court will appoint a receiver, not disturbing prior beneficial interests.”⁶

§ 436. Time of Taking Effect of Appointment of Receiver—Generally.⁷ The appointment of a receiver is, strictly speaking, an equitable remedy and equity acts in personam. The court appointing the receiver acts upon the property to be taken by the receiver mediately and not immediately by orders upon the

⁴ Evelyn v. Lewis (1894), 3 Hare 472, at 475.

⁵ Harmon v. Blackwell (1916), 232 Fed. 440, at 442. See Louisville, etc., Ry. v. Wilson (1890), 138 U. S. 501, at 506, 34 L. ed. 1023; Union Trust Co. v. Illinois, etc., Co. (1885), 117 U. S. 434, at 465, 29 L. ed. 963.

⁶ Davis v. Duke of Marlborough (1819), 2 Swanst. 165.

⁷ See this chapter, sec. 439, “Effect of Appointment of Receiver on Real Estate;” sec. 440, “Effect of Appointment of Receiver on Chattels,” and other sections and subsections on the various phases of the subject. See chapters on “Receiver in Bankruptcy, Effect of Filing of Petition in Bankruptcy,” and “Effect of Appointment of Receivers in Bankruptcy.”

defendant or others to give up and not interfere and by orders upon the receiver to take possession. Natural justice requires a person to have notice of a suit before he can be conclusively bound by its results.⁸

Even when jurisdiction has so attached, nothing more than a *lis pendens* operates on the property until some seizure of the property by the court has taken place, either actual or constructive. The English courts seem to demand first an order of the court in a case properly instituted and further some bringing home of an order appointing a receiver to the party to be bound by it. The American courts lay down a broader principle and say simply that the order itself from the time it is issued places the property in *custodia legis*.

Said Mr. Justice Day, of the United States Supreme Court, when discussing the jurisdiction of a court over the property of the Water-Pierce Oil Company, being both real and personal: "We think the law of this court is well established to be that jurisdiction over the property was acquired by the state courts when the receiver was appointed, the judicial process served and the receiver duly qualified, although the state receiver had not taken actual possession of the property."⁹

"The appointment of a receiver is completed, at the farthest by the filing and entering of the order appointing him, although before he proceeds to the discharge of his duties, he may be directed to execute and file a proper bond. When that is done, he can take actual, manual possession of the property, and his title relates back to the time of his appointment."¹⁰ The moment the receiver is appointed he becomes

⁸ The Lafayette Ins. Co. v. French (1855), 18 How. 404, at 406, 15 L. ed. 451; cited in Pennoyer v. Neff (1877), 95 U. S. 714, at 730, 24 L. ed. 565.

⁹ Palmer v. Texas (1908), 212 U. S. 118, at 129, 53 L. ed. 435, citing Farmers L. & T. Co. v. Lake St. Ry. (1899), 177 U. S. 51, at 61, 44 L. ed. 667, 20 Sup. Ct. Rep. 564. See Shields v. Coleman (1894), 157 U. S. 168, at 178, 39 L. ed. 660, 15

Sup. Ct. Rep. 570. Case of railroad property. See the necessity of notice in the case of personalty under the English doctrine, this section, "English Doctrine as to Personalty."

¹⁰ Matter of S. S. T. B. Co. (1892), 136 N. Y. 169, at 173, 32 N. E. 623; Horn v. Pere Marquette R. Co. (1907), 151 Fed. 626, at 633; Saginaw County Savings Bk. v. Duffield (1909), 157 Mich. 522, 122 N. W. 186; Temple v. Glasgow (1897), 80

an officer of the court, and from that time the property is in custodia legis and the court has power to preserve it.¹¹

Says the Supreme Court of New York, 1862: "When an order is made for the appointment of a receiver of particular property (partnership property), it amounts to a sequestration by act and operation of law of such property, and when the receiver is subsequently appointed the title to such property vests by relation from the date of the order to the same effect as if such receiver was named in and appointed by such order."¹²

Property that is liable to levy under execution at law can not be levied upon subsequent to an order appointing a receiver. Such an order is equivalent to an actual levy in behalf of the suitor in the court.¹³

The receiver's right to possession to defendant's property dates from his appointment and not from the commencement of the action in which he was appointed.¹⁴

The American courts, although not saying so, are really extending the doctrine of *lis pendens* and compelling the whole realm or sovereignty to take notice not only of all cases pending but of an interlocutory order made in such cases. We believe under this unlimited doctrine cases may arise where an innocent purchaser without notice or other innocent action as to the property, particularly personal property, may not receive justice in certain cases where the notice of the appointment of a receiver was not actually brought home to such innocent party.¹⁵

Fed. 441, at 447; Connecticut River Bk. Co. v. Rock-Bridge Co., 73 Fed. 709, at 711; East Tenn., etc., Ry. v. Atlanta (1892), 49 Fed. 608; Ardmore Nat. Bk. v. Briggs Mch., etc. (1908), 20 Okla. 427, 94 Pac. 533; Generotzky v. Barnay Hotel Co. (1915), 85 N. J. Eq. 63, 95 Atl. 865.

¹¹ Matter of C. J. Co. (1891), 128 N. Y. 550, at 553, 28 N. E. 665.

¹² Van Alstyne v. Cook (1862), 25 N. Y. 489, at 496; Davenport v. Kelly (1870), 42 N. Y. 193, at

199; Fairfield v. Weston (1824), 2 S. and S. 96; Porter v. Williams (1853), 5 Seld. 142; receiver under supplementary proceeding, Rutter v. Talis (1852), 5 Sandf. 610.

¹³ Storm v. Waddell (1845), 2 Sandf. Ch. 494, at 516.

¹⁴ American Clay Mach. Co. v. New England, etc. (1913), 87 Conn. 369, at 374, 87 Atl. 731.

¹⁵ See necessity of notice discussed at length in "English Doctrine as to Personality," this section.

(a) **English Doctrine as to Personalty.** Said Lindley, L. J., concerning the appointment of a receiver of a partner's share and profits: "The effect of that is that the appointment of a receiver operates as an injunction against the execution debtor receiving anything from his copartners, and if the copartners pay over to him anything with knowledge of the appointment of the receiver, they may get into trouble."¹⁶ The appointment of a receiver in equitable execution or under creditors' bills, as the term is used in America, prevents the judgment debtor from receiving anything from his debtor to which the judgment debtor is equitably entitled.¹⁷

Notice of the appointment to the trustees or any other person in possession is, of course, necessary to perfect the title of the receiver, and this it would be his first duty to give.¹⁸

Where a court has merely directed that a receiver be appointed, but he has not actually been appointed, and when though by this decree the parties to the suit are not allowed to touch the property, the receiver has not been appointed and the property is not in fact in possession of the court. The decree merely directing that a receiver be appointed operates as between the parties and does not affect outsiders. Such a decree appointing the receiver is a decree for the benefit of the parties to the suit; it is not to stay creditors; it is not like the case of an administration suit where the object is to administer the property equally among all the creditors, but to do justice to the parties to the suit and therefore until a receiver is actually in possession, what reason is there why a creditor should be prevented from going on to recover his debt?¹⁹

When the defendant is in the possession of personal property and an order is made that a proper person be appointed receiver of such property, the immediate effect of such

¹⁶ *Brown, Jansen & Co. v. Hutchinson & Co.* (1895), 1 Q. B. 734, at 739.

¹⁷ *Ideal Bedding Co. v. Holland* (1907), 11 Ch. D. 157, at 169; *In re*

Marquis of Anglesey (1903), 11 Ch. D. 727.

¹⁸ *Ideal Bedding Co. v. Holland* (1907), 11 Ch. D. 157, at 169.

¹⁹ *Defries v. Creed* (1865), 34 L. J. Ch. (N.S.) 607.

an order is to make the defendants "bare custodians" for the court. If in pursuance of such order a receiver is duly appointed to whom the defendants deliver the property, then such receiver at such time has the actual possession.²⁰

(b) **American Doctrine as to Personalty.**²¹ It is impossible to lay down a fast and rigid rule stating exactly when the personalty covered by the receivership is affected as to bind third parties.

It may be said, however, that it is the duty of the receiver to take actual possession. When that is done the property is in custodia legis and third parties are affected.

When the order is made appointing a receiver and the defendant is in court he is affected, but it is hard to see how such an order affects innocent purchasers or other innocent actors concerning the property who had no notice of the appointment,²² when neither the receiver nor the court has done anything to put the third party on notice of the receivership.²³

When the receiver is appointed without notice to the defendant, it is hard to see how he can be affected by such appointment, if he or his agents dispose of the property to innocent third persons, all without knowledge of the appointment.²⁴

(c) **English Doctrine as to Real Estate.**²⁵ The appointment of a receiver of land is not actually delivering the same in execution. When the defendants have not the land in question in their possession, a receiver appointed for that land can not be regarded as having had that land actually delivered to him.²⁶

²⁰ *Peruvian Guano Co. v. Dreyfus Brothers & Co.* (1892), App. Cases 166, at 187.

²¹ See this chapter, sec. 440, "Effect of Appointment of Receiver of Chattels."

²² See case where third party seized property with notice, *Generotzky v. Barnay Hotel Co.* (1915), 85 N. J. E. 63, 95 Atl. 865.

²³ See *Noyes v. American Freehold Land Mtg. Co.* (1906), 97 Minn. 38, 105 N. W. 1126 (note).

²⁴ See this chapter, sec. 440, "Effect of Appointment of Receiver of Chattels."

²⁵ See this chapter, sec. 439, "Effect of Appointment of Receiver of Real Estate—English Doctrine."

²⁶ *Harrison v. Bottomley* (1899), 1 Ch. D. 465, at 472. See this chapter, sec. 439, "Effect of Appointment of Receiver of Real Estate—English Doctrine."

(d) **American Doctrine as to Real Estate.**²⁷ In the case of real estate, neither a receiver nor a judgment creditor need take actual possession. After the order appointing the receiver and enjoining the defendant, its officers and enjoining all persons claiming to be creditors from instituting any suits and from further prosecuting any suits, no liens can be obtained against the property.²⁸

§ 437. Effect of Appointment of Receiver in Bankruptcy.²⁹

(a) **English Bankruptcy Act.** The law relating to receiving

²⁷ See this chapter, sec. 439, "Effect of Appointment of Receiver of Real Estate—American Doctrine."

²⁸ *Temple v. Glasgow* (1897), 80 Fed. 441, at 447.

In the state of Georgia the Civil Code (Civil Code of Georgia, sec. 4967), prescribes that if a petition is filed praying for any extraordinary process of remedy, the sanction of the judge of the court must be first obtained before such process is issued or such remedy granted, and that the application may be ex parte and granted without a hearing in cases of manifest necessity.

Said Evans, P. J., of the Supreme Court of Georgia (*Young v. Hamilton* (1910), 135 Ga. 339, at 346), 69 S. E. 593: "The court, in sanctioning the bill, acquires at least such inchoate jurisdiction over the petition and the res as to preserve the status, where the sworn petition or supplementary proof makes it manifest that the rights of the parties will be seriously impaired unless the status be preserved. A party may not present a petition to a judge praying the grant of an interlocutory restraining order and the appointment of a temporary receiver, and procure an ex parte order to this effect, with direction that the application be filed, and then withhold it from the records. As soon as the judge favorably acts upon such petition and sanctions it, it then becomes a pro-

ceeding in court, at least to the extent that he has power to see that his order is carried out in respect to the prompt filing and service of the same. So far as the suit may affect third parties under the doctrine of *lis pendens*, whose rights have been acquired intermediate the sanction and actual filing, the commencement of the suit is from the filing of the petition with the clerk, where it has been followed by service; yet as between the parties, the judge has such jurisdiction over the whole res when the bill is presented to him for sanction that he may by proper order preserve the status in emergent cases in advance of the filing; and when the bill thus sanctioned has been filed, the jurisdiction of the court, which was inchoate upon the sanction of the petition becomes perfect upon the filing, followed by service."

This case illustrates the necessity of a receiver giving proper notice of his appointment wherever there is personalty or real estate affected by the appointment, even where there is no statute requiring such registry as is required in Minnesota, and as was done in *Noyes v. American Freehold Land Mortgage Co.* (1906), 97 Minn. 38, 105 N. W. 1126 (note).

²⁹ See subject discussed at length in ch. XVII, "Receivers in Bankruptcy Proceedings."

orders in bankruptcy is contained in sec. 7 et seq. of the English Bankruptcy Act of 1914. Such a receiving order is not equivalent to an adjudication of bankruptcy; it does not divest the debtor of his property, nor make him a bankrupt, nor place him under the disabilities of an adjudicated bankrupt. Notwithstanding a receiving order, the debtor is the only person who can sue for the recovery of what belongs to him; and if he does so, he can not be regarded as the mere instrument of some other person or persons and so brought within the principle applicable to cases of that kind, unless and until he becomes bankrupt. What the plaintiff recovers in the action is his property, both legally and equitably, although he must, when he recovers it, hand it over to the official receiver for the benefit of his creditors, if he does not pay or compound with them.³⁰

(b) American Bankruptcy Act.³¹ The jurisdiction of the court of bankruptcy is asserted over the property of the bankrupt at the time the petition is filed. The filing of the petition in bankruptcy is a caveat to all the world and in effect an attachment and injunction. "The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition."³² In ordinary equitable actions in personam in which a receiver is appointed, the property is not in custodia legis until the court itself acts and takes the property into its possession by the appointment of a receiver.

As shown above the bankruptcy court gets custodia legis of the property upon filing the petition. When the court or the referee appoints a receiver, he becomes a temporary custodian and it is his duty to hold possession of the property until the termination of the proceedings, or the appointment of the trustee. The court has jurisdiction of the prop-

³⁰ *Rhodes v. Dawson* (1886), 16 Q. B. D. 554; *in re Smith* (1893), 1 Q. B. 326.

³¹ See subject discussed at length in ch. xvii, "Receivers in Bankruptcy Proceedings."

³² *Acme Harvester v. Beekman* (1911), 222 U. S. 300, at 307, 56 L. ed. 208, 32 Sup. Ct. Rep. 96. See *Mueller v. Nugent* (1901), 184 U. S. 1 at 14, 45 L. ed. 711.

erty before the appointment and continues to have after the appointment. This jurisdiction can not be ousted from the court by a surrender of the property by the receiver without authority of the court.³³

§ 438. Effect of Appointment of Receiver and Manager of Assets of Corporation. The ordinary appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company any more than the taking possession by the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist, but it entirely supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge or otherwise dispose of the property put into the possession or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance.³⁴

§ 439. Effect of Appointment of Receiver of Real Estate.
(a) English Doctrine. When a receiver is appointed by way of equitable execution on behalf of a judgment creditor, "as soon as the order was made appointing a receiver it bound the land, and if the order was afterward perfected by the receiver giving security, it would relate back to the date when it was made."³⁵ James, L. J., said in 1879, "A receiver of land never takes actual possession, he only receives the rent."³⁶ Yet in 1901 a case was presented to the same English chancery court and Joyce, J., allowed a receiver to take actual possession of a hotel to preserve the licenses because the defendant was shutting up the premises and going away.³⁷

When a receiver is appointed for a company and no direc-

³³ *Whitney v. Wenan* (1904), 198 U. S. 339, at 553, 49 L. ed. 1157.

³⁴ *Moss Steamship Co., Ltd., v. Whinney* (1912), A. C. 254, at 263; Lord Atkinson. See cases under "Receivers of Corporations," ch. xiv, *supra*

³⁵ *Ex parte Evans* (1879), 13 Ch. D. 260.

³⁶ *Ex parte Evans* (1879), 13 Ch. D. 255.

³⁷ *Charrington & Co. v. Camp* (1902), 1 Ch. D. 386.

tion whatever for the delivery up of possession, it may be that the receiver may not take possession, but only receive and manage the income and business of the company.³⁸ The receiver may, however, be first let into the possession of the property of the company.³⁹

When a receiver collects the rents and profits of property he does not do it by virtue of any estate or title that is vested in him, he is merely the officer of the court to collect the rents upon the title of some persons, parties to the action.⁴⁰

(b) **American Doctrine.** In America a receiver of land does frequently take possession and any interference with his possession is contempt of the court appointing the receiver.⁴¹ There can be no doubt as to the power of the court to appoint a receiver in an action to foreclose a mortgage to take possession of the mortgaged property and impound the rents and profits up to the time of the sale.⁴² An order may go so far as to order the defendants in possession of land, their tenants and attorneys, to surrender immediate actual possession of the land to the receiver.⁴³

§ 440. Effect of Appointment of Receiver of Chattels. The distinction which seems to underlie the decisions concerning the effect of an appointment of a receiver of chattels and of real estate is that the title to real estate is of record and the law charges persons with knowledge of certain records. Furthermore judgments are general liens or pre-emptive rights on real estate either by decisions of courts⁴⁴ or by statute, but are not general liens on chattels.

The title to personal property is not ordinarily of record and ordinarily to charge a person with notice of a change in ownership of chattels, there must be a change in possession.

³⁸ *In re Marriage Neave & Co.* (1896), 11 Ch. D. 671, C. A.

³⁹ *In re Marriage Neave & Co.* (1896), 11 Ch. D. 677, C. A.

⁴⁰ *Vine v. Raleigh* (1883), 24 Ch. D. 243.

⁴¹ *Delozier v. Bird* (1898), 123 N. C. 693, 31 S. E. 834.

⁴² *Platt v. New York & Sea Beach Ry. Co.* (1902), 170 N. Y. 457, 63 N. E. 532.

⁴³ *Williamson v. Pender* (1900), 127 N. C. 481, 37 S. E. 495.

⁴⁴ See matter gone into at length by Judge Story in *Ex parte John S. Foster* (1842), 2 Story 131, at 146.

What is the effect of an order appointing a receiver of a chattel? To what end can it be said that the legal right to the chattel remains in the original owner of it? Says Bacon, V. C.,⁴⁵ in answer to the above questions:

“The court orders some other person neither the plaintiff nor the defendant to take possession. There is an end to any question about the legal right. The legal right no matter what it is must be subservient at all times to the equitable decisions which will ultimately be pronounced. In the meantime the receiver takes possession.”

But until a receiver does by the order of court take possession of the chattels, what are the rights of an execution creditor as against those chattels, when the execution creditor seizes them before the receiver actually takes possession? In a case where a mortgagor makes a bill of sale, but does not register it, but an equitable mortgagee files a suit and asks for the appointment of a receiver, and an order is made that a person be appointed receiver of the chattels upon giving security, Melish, L. J., said: “If the receiver had really taken possession before the goods were seized, then although he had not been completely appointed receiver still as possession would have been taken on behalf of the mortgagee, he would hold them.”⁴⁶

But says James, L. J.,⁴⁷ in the same case, “I think it would be dangerous to hold that a mere consent order for the appointment of a receiver should shut out all execution creditors.

Says Farwell, J., of the chancery division of the English Supreme Court of Judicature: “Whatever may be the construction of the appointment of a receiver by way of equitable execution as applied to a charge on real estate, I am of the opinion it is settled as regards personalty, that when the order is in the form of appointing a receiver upon giving security,

⁴⁵ Taylor v. Eckersley (1877), 5 Ch. D. 740, at 744.

⁴⁶ Melish, L. J., in Edwards v. Edwards (1876), C. A. 2 Ch. D. 298.

⁴⁷ James, L. J., in Edwards v. Edwards (1876), 2 Ch. D. 296.

his appointment is not effectual till the security is given. It is a conditional appointment and the giving of security is a condition precedent.”⁴⁸

A check was given to an attorney of a corporation as a retainer. Before the lawyer presented the check to the bank for payment, a receiver had been appointed over the corporation with knowledge of the lawyer. The court held that the bank was the debtor to the company for whatever balance stood to the latter's credit, which it was to pay out on the order of the corporation. The lawyer was receiving from the bank's moneys which ought to have been turned over to the corporation or to its receivers.⁴⁹

Under a New Jersey statute⁵⁰ the court held that title to the property of an insolvent corporation vests in the receiver immediately upon the appointment being made, wherefore, when the owner of a hotel seized money in the hotel safe after the appointment of a receiver, but before the receiver had qualified by giving bond the parties who seized the money being appraised of the appointment of a receiver such seizure was without right since the title to the money had under the statute vested in the receiver.⁵¹

Said Kindersley, V. C.: “The decree appointing the receiver is a decree for the benefit of the parties to the suit; it is not like the case of an administration suit where the object is to administer the property equally among all creditors, but to do justice to the parties to the suit and all who have qualified as entitled to distribution from the funds in court by filing their claims or otherwise obeying the orders or instructions of the court. And therefore until a receiver is actually in possession of chattel property what reason is there why a creditor should be prevented from going in to recover his debt?”⁵²

⁴⁸ *Ridout v. Fowler* (1904), 1 Ch. D. 662.

⁴⁹ *Bowker v. Haight & Freese Co.* (1908), 146 Fed. 257.

⁵⁰ Section 68, Corporation Act (29 Stats. 1644).

⁵¹ *Generotzky v. Barney Hotel Co.* (1915), 85 N. J. E. 63, 95 Atl. 865.

⁵² *Defries v. Creed* (1865), 34 L. J. Ch. (N.S.) 607. Because New York Civil Code, sec. 715, was not fully complied with and copy of ap-

§ 441. Effect of Appointment of Receiver of Chattels—Partnership Property. An important case on the above subject is found wherein the court ordered a dissolution of the partnership and ordered a proper person to be appointed receiver, but at the time did not specify who. Later on one Hedges was nominated by the court and subsequently actually appointed and gave bond. After the nomination, but before he gave bond and qualified the sheriff took possession of two barges, certain partnership property. Held the decree appointing the receiver operated between the parties to the suit, but did not affect outsiders. The decree appointing the receiver is a decree for the benefit of the parties to the suit; it is not to stay creditors; it is not like the case of an administration suit where the object is to administer the property equally among all creditors, but to do justice to the parties to the suit and therefore until a receiver is actually in possession what reason is there why a creditor should be prevented from going on to recover his debt? ⁵³

“The effect of the decree of dissolution and the settlement of the affairs of the partnership through the court has been held to be, so far as creditors are concerned, analogous to a creditor’s bill, and the debts existing are held to be fastened on the assets.” ⁵⁴

§ 442. Effect of Appointment of Receiver of Choses in Action. A receiver may be appointed by way of equitable execution of the defendant’s equitable reversionary interest under a will in personalty. Such an interest can not be taken by an elegit under the English practice nor under ordinary execution against personalty as obtains generally in the United

pointment of receiver filed in proper county, it was held that receiver did not become vested with the title of certain vessels and therefore could not sell them. *Edgerly v. Blackburn* (1910), 125 N. Y. S. 353.

⁵³ *Defries v. Creed* (1865), 34 L. J. Ch. (N.S.) 607.

⁵⁴ *Brockhurst v. Cox* (1906), 71 N. J. E. 703, at 710, 64 Atl. 182; affirmed, *Brockhurst v. Cox* (1907), 71 N. J. E. 950. Original cases cited, *Ross v. Tittsworth*, 37 N. J. E. 337; *Kilpatrick v. McElroy*, 41 N. J. E. 539, 7 Atl. 647; *Smith v. Crater*, 42 N. J. E. 348, 7 Atl. 575; *Van Alstyne v. Cook*, 25 N. Y. 489, at 495.

States.⁵⁵ "The appointment of such a receiver over such choses in action does not create any charge,⁵⁶ but it operates as an injunction to restrain the defendant from himself receiving the proceeds of sale and may possibly be useful."⁵⁷ It furthermore prevents the debtor dealing with the moneys, to the prejudice of the judgment creditor, and it also prevents any subsequent judgment creditor from gaining priority over the creditor obtaining the order, if at the date when obtained the property of the judgment debtor can not be taken in execution or made available by any other legal process.⁵⁸ No subsequent mortgagee or judgment creditor can gain priority in payment by a stop order or charging order.⁵⁹

Kenwich, J., says:⁶⁰ "I do not myself see how the court after restraining the defendant from himself receiving the property can stop short of granting whatever injunction is necessary to prevent its being received by others." But of course to enjoin others from receiving the property, they must be made parties.

The right way to obtain equitable execution against money in the hands of trustees is to file a bill not only against your debtor, but also against the person who has the property which you are after. Until there is an order on those having the property the appointment of the receiver can not be a charge.⁶¹

Order for a Receiver of Choses in Action Operates as Injunction. The appointment of a receiver of an equitable reversionary interest in a sum of money—the proceeds of the sale of the land by a judgment creditor does not create a

⁵⁵ *Tyrrell v. Painton* (1895), C. A. 1 Q. B. 205.

⁵⁶ *Ridout v. Fowler* (1904), 1 Ch. D. 662.

⁵⁷ *In re Peak Hill Goldfield* (1908), C. A. 1 K. B. D. 436; *Tyrrell v. Painton* (1895), C. A. 1 Q. B. 206.

⁵⁸ *In re Marquis of Anglesey* (1903), 11 Ch. D. 731.

⁵⁹ *In re Marquis of Anglesey* (1903), 11 Ch. D. 732.

⁶⁰ *Ideal Bedding Co., Ltd., v. Holland* (1907), 11 Ch. D. 170.

⁶¹ *Croshaw v. Lyndhurst* (1897), 11 Ch. D. 160; *In re Shephard*, 43 Ch. D. 131; *Ridout v. Fowler* (1904), 11 Ch. D. 661. See *Ideal Bedding Co. v. Holland* (1907), 11 Ch. D. 157.

charge, but it operates as an injunction to restrain the defendant from himself receiving the proceeds of sale.⁶²

It is not disputed that when equitable execution is obtained, that is, a receiver is appointed of the debtor's interest in certain stock, that such an order has the effect of an injunction and prevents the judgment debtor from receiving the debt although it does not make the judgment creditor a secured creditor.⁶³

§ 443. Effect of Appointment of Receiver Ex Parte over Lunatic's Property. As soon as the summons is issued in lunacy, the judge in Lunacy has jurisdiction to make orders for the protection of the lunatic's property, but until some order is made showing that the crown has actually taken the property of the lunatic under its protection, it has never yet been held to be withdrawn from legal process by a creditor of a lunatic.⁶⁴ A solicitor who receives rents in a cause without the authority of the court after order appointing a receiver but before he completes his surety, will be ordered to pay the rents over to the receiver when the appointment is complete and can not retain them on the ground of a lien.⁶⁵

§ 444. Effect of Tortious Taking before Appointment Perfected. Until a receiver of rents has given security, if security is required, his appointment is formally incomplete and he has not full authority to receive the defendant's property over which he is appointed until his appointment character of receiver is complete. However, a solicitor who receives rents in a cause without the authority of the court after order appointing a receiver but before he completes his surety, will

⁶² *Tyrrell v. Painton* (1895), 1 Q. B. 202, at 206.

⁶³ *In re Peak Hill Goldfield, Ltd.* (1909), 1 K. B. 430. See *Ideal Bedding Co. v. Holland* (1907), 11 Ch. D. 157.

⁶⁴ *In re Clark* (1898), 1 Ch. D. 340, C. A.

⁶⁵ *In re Birt.* (1883), 22 Ch. D. 604.

be ordered to pay the rents over to the receiver when the appointment is complete and can not retain them on the ground of a lien.⁶⁶

§ 445. Effect of Injunction against Judgment Debtor.

(a) American Cases. A creditor's bill is sometimes filed for discovery and an injunction issued directed against the defendant enjoining him from disposing of his property, transferring or assigning the same. Such an injunction can only operate on the defendant party to the proceeding and will not, of course, prevent another judgment creditor levying upon property of the defendant which is the proper subject of a levy and sale on execution, before the title of the defendant in such property is equitably divested by an order for a sequestration thereof or for the appointment of a receiver.⁶⁷ The reason that an equitable lien does not attach to such property in behalf of the judgment creditor is that the property being already a proper subject of an ordinary levy and sale on execution can not be the subject of an equitable execution or equitable levy.

(b) English Cases. When an application for a receiver is made *ex parte*, the practice is attended with difficulties and drawbacks. This is not frequently done, but provision is now made for notice of the application and for a hearing. During the interval between the notice of the application and the hearing of it, there may be danger in some cases that the property to which the application relates may be made away with by the judgment debtor. Provision for the purpose of meeting that danger is made by the English courts by granting an *ex parte* injunction until the hearing of the application for a receiver. The court might obtain the same result by appointing a receiver *ex parte*, but that course may involve increased expense and delay.⁶⁸

⁶⁶ *Wickers v. Townshend* (1830),
1 Russ. & M. 361, at 363.

⁶⁷ *Lansing v. Easton* (1839), 7
Paige 364.

⁶⁸ *Lloyd's B. K., Ltd., v. Medway*
(1905), C. A. 12 K. B. D. 364.

Such injunction is not a matter of course, but an affidavit must be filed showing danger that the property will be made away with by the defendant.⁶⁹

§ 446. Nature of an Equitable Lien. "Lien," properly speaking, is a word which applies only to a chattel. "Lien upon a judgment" is a vague and inaccurate expression and the words "equitable lien" are intensely undefined.⁷⁰

A lien may only be created by contract implied or expressed of the owner of property or his agent, or without the owner's consent by force of the sovereignty acting by positive statute or rule of law.⁷¹

By the common law independent of statutable provision or by special contract a lien imports that the party claiming the lien is in possession of the thing and where there is no possession actual or constructive there can be no lien.⁷²

In equity liens exist independent of possession either actual or constructive.⁷³ However a lien in equity is not a property in the thing itself nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing. It is therefore at most a simple right to possess and retain property until some charge attaching to it is paid or discharged or a mere right to maintain a suit in rem to enforce payment of the charge.⁷⁴

A lien created by judgment is only a general lien or charge

⁶⁹ Lloyd's B. K., Ltd., v. Medway (1905), C. A. 12 K. B. D. 364.

⁷⁰ Erle, J., in *Brunsdon v. Allard* (1859), 2 El. & E. 19, at 27.

⁷¹ *Legard v. Hodges* (1792), 1 Ves. Jr. 478; *Ketchum v. St. Louis* (1879), 101 U. S. 306, 25 L. ed. 999; *Paton v. Robinson* (1909), 81 Conn. 547, 71 Atl. 730; *Garrison v. Mills* (1910), 154 N. C. 1, 69 S. E. 743.

⁷² *Ex parte John S. Foster* (1842), Story, J., 2 Story 144.

⁷³ *Ex parte John S. Foster* (1842), Story, J., 2 Story 145; *Brace v. Duchess of Marlborough* (1728), 2 P. Wms. 491; *Ex parte Knott* (1806), 11 Ves. 617; *Conard v. The Insurance Co.* (1828), 1 Pet. 386, at 441 and 442, 7 L. ed. 189.

⁷⁴ *Ex parte John S. Foster*, Story, J. (1842), 2 Story 145; *Brace v. Duchess of Marlborough* (1728), 2 P. Wms. 491; *Ex parte Knott* (1806), 11 Ves. 617; *Conard v. The Insurance Co.* (1828), 1 Pet. 386, at 441 and 442, 7 L. ed. 189.

over all the real estate of the debtor to be enforced by an eligit, or other legal process upon such part of the real estate of the debtor as the creditor may elect. A judgment creates no interest in the land.⁷⁵ The judgment creditor only has a sort of pre-emptive right or lien to acquire an interest and when he does acquire it, his title relates back to the time of the judgment so as to cut down all intermediate incumbrances, sales and other puisne titles.⁷⁶

When, however, the judgment creditor does not get a lien at all either by judgment or by issuing execution, then it is difficult to explain how he gets an equitable lien by filing a creditor's bill. The filing of a bill can not create a lien by the act of the owner of the property because such a bill is generally hostile to the owner; it can not be the act of the sovereign because the sovereign takes no part in filing the bill. It is simply the act of the judgment creditor. The sovereign acting through statute or through the decision of the court however may say. If the creditor files his bill he may by doing so give notice of his claims. This giving notice and properly describing the property establishes a *lis pendens*.⁷⁷ We submit the American authorities hold very generally with the exception of a short line of cases headed by a Massachusetts case, *Trow v. Lovett*,⁷⁸ decided by Gray, C. J., that a judgment creditor does get a lien but we believe the courts use the word "lien" in a very broad sense and mean, "Neither a *jus ad rem* nor a *jus in re*, but a right of a special nature over the thing which may by proper process be sold or sequestered under a judicial decree and the proceeds in the one case or the rents and profits in the other applied upon demand of the party holding the equitable lien."⁷⁹

⁷⁵ Many states provide by statute for judgment liens on land and these statutes must be carefully studied to ascertain the lien intended.

⁷⁶ *Ex parte John S. Foster* (1842), 2 Story 146.

⁷⁷ *Miller v. Sherry* (1864), 2 Wall. 237, 17 L. ed. 827.

⁷⁸ *Trow v. Lovett* (1877), 122 Mass. 572.

⁷⁹ *Field v. Lang* (1895), 87 Me. 441, at 443, 32 Atl. 1004. See *Pomeroy, Equity*, p. 1233.

An equitable lien like a legal lien must be by contract expressed or implied or by act of the sovereign. It is hard to see how a creditor by filing his bill comes under either of these headings. It is very hard to conceive how a judgment creditor, if he has no lien, either legal or equitable, general or specific over the judgment creditor's property before he files his bill in equity, gets one by the simple filing of a creditor's bill. To get a lien it would seem that either the judgment debtor must create the lien by contract expressed or implied or else the sovereign must step in and through the court make an order.

When a judgment creditor files his creditor's bill and has summons properly issued and provided he has properly described certain property of the judgment debtor, then the doctrine of *lis pendens* applies and protects the judgment creditor. "That the filing of a creditor's bill by a judgment creditor operates as constructive notice and such judgment creditor acquires an equitable lien the moment of filing his bill in court" was first held by Vice Chancellor McConn in 1839⁸⁰ and this inaccurate (we believe) expression has been frequently used in America ever since.

§ 447. Effect of Filing Bill in Equity against Judgment Debtor. (a) English Doctrine. Prior to the English Judicative Act of 1873, the English courts of equity proceeded to grant relief to a judgment creditor who could not get satisfaction out of the judgment debtor's lands, by the ordinary modes of so-called legal procedure, because such legal modes proved ineffectual by reason of the imperfection of the statutes which authorized the sheriff to deal with the property of the debtor. The mode which the English courts of chancery adopted was the appointment of a receiver and was called equitable execution.

Prior to the Judicature Act, the courts of equity before granting equitable execution, required to be satisfied of two

⁸⁰ *Scudder v. Van Ambrug* (1839), 4 Ed. Ch. 27.

things, first the plaintiff in the action had tried all he could to get satisfaction at law, and then that the debtor was possessed of that particular equitable interest which could not be attached at law. As a rule, your right to recover a money demand could only be fully recognized in a court of law. Most money demands were only cognizable there; and therefore, as a rule, when you had a mere money demand, you were compelled to bring an action in a court of common law to recover it, and then when you had got your judgment, you were compelled to bring a new action—then called a suit in equity—by bill to enforce the judgment. This latter bill the American courts call a “creditor’s bill.”

The English Judiciary Act of 1873 did not change the rights of the judgment creditor but gave such creditor the remedy in order to satisfy his judgment to have a receiver appointed upon motion in the original action, although the writ in the original action may not have been indorsed with a claim for a receiver, and it now is unnecessary to bring another action for the purpose.⁸¹

The object of the appointment of such a receiver is to keep out execution creditors and the receivers holding of the property prevented the execution creditor from getting what they would otherwise have got.⁸²

The practice today is for the judgment creditor to apply for a summons for the appointment of a receiver of the property in respect to which an application for the appointment of a receiver is pending, is in danger. The court has power to protect it by granting an ex parte injunction until the hearing of the application. The court might obtain the same result by appointing a receiver ex parte but that course may involve increased expense and delay.⁸³

The appointment of a receiver according to the English cases gives the judgment creditor certain rights but it is not

⁸¹ *Salt v. Cooper* (1880), 16 Ch. D. 544 C. A.

⁸² *Salt v. Cooper* (1880), 16 Ch. D. 558 C. A.

⁸³ *Lloyd’s B. K., Ltd., v. Medway* (1905), 11 K. B. D. 363 C. A.

held in any of the English cases that the appointment gives the judgment creditor a lien. Far less is it even intimated that the issuing of summons or the filing of the bill in equity, or motion by the judgment creditor gives such creditor a lien on the judgment creditor's property. The authorities in America, however, hold that the filing of a creditor's bill by the judgment creditor gives him a lien.

A court of equity when it grants a judgment creditor relief and permits and aids him to realize his judgment out of the choses in action of the judgment debtor, does not do it on the ground that the judgment creditor has a specific lien, but because he has not an adequate remedy at law. There being no lien on the choses in action of the judgment debtor by reason of the judgment or by reason even of a *fiery facias* and if the debtor had assigned the choses in action *bona fide* and for valuable consideration and without notice, it would be good and prevail against the creditor.

But after the creditor has brought his bill in equity although even then he does not obtain a lien on the choses in action, a *lis pendens* is created as to the chose in action and an assignment by the debtor after that can not prevail.⁸⁴ This is old law but the principle is good today.

The filing of a suit in equity by a judgment creditor to get at the defendant's property which is not available by ordinary legal methods when it specifies and charges a particular estate either of personalty or realty, and when the necessary statutory steps (if any) necessary to create a *lis pendens* are taken, then the plaintiff may have priority as against a purchaser or mortgagee taking subsequently to the registration of a *lis pendens*.⁸⁵ But none of the English cases hold as do many American cases that the filing of the bill in equity by the judgment creditor creates an equitable lien on his real estate or choses in action.

⁸⁴ *Edgell v. Haywood* (1746), 3 Atk. 357.

⁸⁵ *Price v. Price* (1887), 35 Ch. D. 297.

(b) **American Doctrine.** Sometimes it is said that the filing of a creditor's bill in equity gives a judgment creditor an equitable lien or equitable execution or equitable levy on the judgment debtor's property. If the judgment creditor can not find property of the debtor subject to legal execution, then no specific lien arises by virtue of the judgment and execution alone.

The proceeding by the judgment creditor is one instituted by him in his own interest unless he elects to file the bill also for others in a like situation with whom he chooses to make common cause, and as no specific lien arises by virtue of the judgment and execution alone, the right to obtain satisfaction out of the specific property sought to be subjected to sale for the purpose dates from the filing of the bill.⁸⁶

The creditor whose legal diligence has pursued the property into a court of equity, is entitled to a preference as the reward of his vigilance "and it would seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination should in the end be obliged to divide the avails thereof with those who have slept on their rights, or who have intentionally kept back that they might profit by his exertions when there could no longer be any risk in becoming parties to the suit."⁸⁷ Thus a creditor's equitable lien begins with the filing of his bill⁸⁸ and it is subject to all existing incumbrances, but is superior to all of subsequent date.⁸⁹ This is in strict accordance with the analogy of the law, as it was recognized that the judgment creditor who first extends the land by *elegit* is thereby entitled to be first satisfied out of it. The filing of the bill in cases of equitable execution is the beginning of it.⁹⁰

If judgment creditors have a right to a debtor's interest in property by having sued out execution at law and having

⁸⁶ *Freedman's S. & T. Co. v. Earle* (1883), 110 U. S. 716, 28 L. ed. 301. *Haywood* (1746), 3 Atk. 357; *Beck v. Burdett* (1829), 1 Paige 305.

⁸⁷ *Edmeston v. Lyde* (1829), 1 Paige Ch. 637, at 640. ⁸⁸ *Freedman's S. & T. Co. v. Earle* (1883), 110 U. S. 716, 28 L. ed. 301.

⁸⁹ *Freedman's S. & T. Co. v. Earle* (1883), 110 U. S. 716, 28 L. ed. 301. ⁹⁰ *Lord Hardwick in Edgell v.*

filed their bill in equity before any other judgment creditors had done either, that right could not be affected by a subsequent assignment of that equity by the debtor. * * * It was not in the power of the debtor to withdraw that interest of his from the lien so acquired.⁹¹

And although it is the favorite policy of this court (equity) to distribute the assets among all the creditors *pari passu*, yet when a judicial preference has been established by superior legal diligence of any creditor, that preference will be observed in the distribution of the assets.

§ 448. Effect of Filing Creditor's Bill to Set Aside Fraudulent Conveyance. American Doctrine. There are cases wherein a judgment creditor has an execution issued to the sheriff and finds that the sheriff can not take the judgment debtor's property by reason of some legal obstruction impeding the sheriff, as for instance the judgment debtor has fraudulently assigned or deeded away the property. The property may in fact and in equity belong to the judgment debtor but the legal title is in someone else. In such a case the judgment creditor comes into a court of equity for relief, files his creditor's bill to set aside the fraudulent conveyance and so makes the property available to pay his judgment. According to Walworth, chancellor, in a leading New York case,⁹² the judgment creditor has obtained a lien on the property by issuing the execution, the property in fact and in equity belonging to the judgment creditor, when he has had the legal obstruction removed, he may proceed to enforce his execution by a sale of the property, "although an actual levy is probably necessary to enable the judgment creditor to hold the property against other execution creditors or bona fide purchasers."⁹³

In New York state and other states a judgment creates a lien on certain real estate and the New York cases which hold

⁹¹ Chancellor Kent in *McDermott v. Strong* (1820), 4 Johns. Ch. 687. See subject discussed in (1820), 4 Johns. Ch. 619.

⁹² *Beck v. Burdett* (1829), 1 Paige 305.

⁹³ *Beck v. Burdett* (1829), 1 Paige 305.

that a creditor gets an equitable lien by filing his bill must be based really on the judgment and statute and not on the filing of the bill in equity.⁹⁴

In Massachusetts where a judgment does not create a lien upon lands, Gray, C. J., held that a judgment creditor who had not taken out execution on his judgment does not by filing a bill in equity obtain a lien on the land as against an assignee in bankruptcy.⁹⁵

That the filing of a creditor's bill in equity creates an equitable lien on the judgment debtor's real estate is supported by most of the authorities in America.⁹⁶

Most of these decisions go back for authority to the New York chancery cases above cited.

The weight of authority in America is to the effect that a judgment creditor having had execution issue and a return of nulla bona places him in a position to assail any conveyance made by the judgment debtor to defraud his creditors and when the judgment creditor files his creditor's bill to set aside such a fraudulent conveyance and makes the judgment debtor and alleged fraudulent grantee defendants, and when the court acquires complete jurisdiction over the parties to the suit and the subject-matter, then the plaintiff judgment creditor acquires a lien in equity on the lands mentioned in his bill which entitles him to priority over other creditors.⁹⁷

When a judgment creditor gets his judgment and this judgment is a lien against the judgment creditor's property by statute of the sovereign power or the judgment creditor has

⁹⁴ Crippen v. Hudson (1855), 3 Kernan (N.Y.) 161; Jones v. Green (1863), 1 Wall. 332, 17 L. ed. 553; McElwain v. Willis (1832), 9 Wend. (N.Y.) 548; Beck v. Burdett (1829), 1 Paige 305; Smith v. Gordon (1843), Fed. Cas. 13052.

⁹⁵ Trow v. Lovett (1877), 122 Mass. 572.

⁹⁶ Pool v. Ragland (1876), 57 Ala. 419; Gordon v. Lowell (1842), 21

Me. 251; Lyon v. Robbins (1867), 46 Ill. 276; Sedgwick v. Mench (1686), 6 Black 156; Miller v. Sherry (1864), 69 U. S. 238, 17 L. ed. 827; Carr v. Fearington (1869), 63 N. C. 560; Battery Park Bank v. Bank (1900), 127 N. C. 432, 37 S. E. 461.

⁹⁷ Kimberling v. Hartley (1880), 2 Fed. 573.

had execution issue and thereby obtains a lien in obedience to the statute of the sovereign power, he may find that the property has been fraudulently transferred or encumbered. Fraud vitiates everything and it is necessary for the judgment creditor to come into a court of equity and have the fraudulent obstruction set aside. But the sovereign has given him his lien when it, through the court, gave him a judgment. The filing of the creditor's bill can not well give him what he already had and if the fraudulent conveyance is not set aside, then the judgment creditor has no lien either equitable or legal.

§ 449. Effect of Filing Creditor's Bill as to Equitable Interests—Real Estate. American Doctrine. There are cases wherein a judgment creditor has an execution issued to the sheriff and he finds the property of the defendant can not be reached by the execution at law, not because of any legal obstruction, such as a fraudulent conveyance but because the defendant's interests are purely equitable and there is no legal obstruction to be removed. The judgment creditor's right to relief in a court of equity depends upon his having exhausted his legal remedy, and by showing execution issued and returned *nulla bona*.⁹⁸

Mr. Justice Nelson of the United States Supreme Court in 1860 says: ⁹⁹ "The court of chancery does not give any specific lien to a creditor at large against his debtor, further than he has acquired at law; for as he did not trust the debtor on the faith of such lien, it would be unjust to give him a preference over other creditors and thus defeat a pro rata distribution which equity favors unless prevented by the rules of law. It is only when he has obtained a judgment and execution in seeking to subject the property of his debtor in the hands of third persons, or to reach property not accessible to an

⁹⁸ Beck v. Burdett (1820), 1 Paige 305.

⁹⁹ Day v. Washburn (1860), 24 How. 352, at 355, 16 L. ed. 712.

execution that a legal preference is acquired which a court of chancery will enforce.”

In 1884 Mr. Justice Matthews of the United States Supreme Court reviewed the English and American cases on the subject of equitable execution. Mr. Justice Matthews does not distinguish between cases concerning land or chattels, but his opinion concerns lands held in trust in Maryland, and his conclusions are as follows:

A judgment creditor files a creditor's bill for his own interest unless he elects to file the bill also for others in a like situation with whom he chooses to make common cause, and as no specific lien arises by virtue of the judgment and execution alone and the ground of the jurisdiction is an equity belonging to the judgment creditor to enforce satisfaction of the judgment by means of an equitable execution, therefore the right to obtain satisfaction out of the specific property sought to be subjected to sale for the purpose dates from the filing of the bill.

An example of such a case is when a judgment creditor seeks to make available the equitable interest of the judgment debtor in real estate held in trust for the judgment debtor.

In such a case the court of equity when its aid is invoked looks only to the execution and the return of the officer to whom the execution was directed, the execution shows that the remedy afforded at law had been pursued and of course is the highest evidence of the fact.¹

The creditor's lien begins with the filing of the bill, is subject to all existing encumbrances, but is superior to all of subsequent date. “A lien is given by the court in the exercise of its jurisdiction to entertain the bill and to grant the relief prayed for, and to distribute the proceeds of the sale for the benefit of others, equally with the execution creditor first filing the bill, would be to contradict the very principle of the jurisdiction itself, and defeat the very remedy it promises; for the fruits of litigation according to the rule of equality

¹ Jones v. Green (1863), 1 Wall. 332, 17 L. ed. 553.

would have to be divided, not only with other judgment and execution creditors but as well with all creditors whether their claims had been reduced to judgments or not.”²

§ 450. Effect of Filing Creditor's Bill as to Choses in Action. American Doctrine. When a creditor issues an execution and it is returned unsatisfied, he may file a bill to reach the choses in action and equitable assets of the judgment creditor. The mere filing of the bill creates a lien on such assets.³

The object of a creditor's suit is to have his judgment paid out of the property of the judgment debtor which is not available to ordinary legal execution. In other words, “the object of these suits is to remedy the defect of legal process in the collection of debts.”⁴ The remedy of equity is ancillary and the legal remedy should take precedence so long as possession and title remain in the debtor.⁵ The lien is obtained by the return of an execution unsatisfied and filing a complaint.⁶

If a judgment creditor issues legal execution and can not come at the res because there has been a fraudulent assignment of the same, then when the fraudulent assignment is set aside as void the legal execution is in preference to other creditors who had no such execution.

If instead of asking that a fraudulent assignment be set aside the judgment creditor asks the court of equity to help him realize on the judgment debtor's equitable interest in the res, “there seems no good reason,” says Chancellor Kent, “why his legal priority or lien should not be available.”⁷

Says Chancellor Kent in 1820 in a case wherein a judgment creditor claimed an equitable lien on an equitable interest in

² *Freedman's S. & T. Co. v. Earle* (1883), 110 U. S. 720, 28 L. ed. 301.

³ *Albany Bank v. Schermerhorn* (1840), Clark Ch. (N. Y.) 296; *Greenwood v. Broadhead* (1850), 8 Barb. (N. Y.) 593.

⁴ *Storm v. Waddell* (1845), 1 Sandf. Ch. 514.

⁵ *Storm v. Waddell* (1845), 1 Sandf. Ch. 514.

⁶ *Greenwood v. Broadhead* (1850), 8 Barb. (N. Y.) 593; *Albany Bank v. Schermerhorn* (1840), Clark Ch. (N. Y.) 296.

⁷ *McDermott v. Strong* (1820), 4 Johns. Ch. 686. See *Eameston v. Lyde* (1829), 1 Paige 637, at 640.

a ship, "I regard the law to be clearly settled that before a judgment creditor can come into a court of equity for aid against the goods and chattels of his debtor, or against any equitable interest which he may have therein, he must first take out execution, and cause it to be levied or returned, so as to show thereby that his remedy at law fails and that he has also acquired by that act of diligence a legal preference to the debtor's interest." ⁸

Chancellor Walworth, in 1829, in commenting on the case of *McDermott v. Strong* says that that case "does not sanction the idea that a party obtain any specific lien upon the equitable estate of the debtor by the return of an execution unsatisfied." * * * "Where the property is not levied on by the execution, or where from its nature it could not be reached by an execution at law, the return of the execution unsatisfied does not give the creditor any specific lien. He must follow up his execution by the commencement of a suit in the court of equity before he can obtain any claim to priority." ⁹

§ 451. Effect of Filing Creditor's Bill as to Chattels. American Doctrine. We have Chancellor Kent as authority for the following proposition: "The suing out of an execution is not perhaps sufficient of itself and without some further act to stop the alienation of even a legal interest, or of goods and chattels of the debtor for a valuable consideration to a stranger to the execution. A seizure, a taking into possession an inventory, or some other act amounting to what is understood by an actual levy of the execution is requisite, as I am inclined to think, to create a bar to a subsequent bona fide sale." ¹⁰

A bill in equity may be filed by a judgment creditor to remove obstructions in the title of the debtor in the creditor's

⁸ *McDermott v. Strong* (1820), 4 Johns. Ch. 687.

⁹ *Eameston v. Lyde* (1829), 1 Paige 637.

¹⁰ *Hendricks v. Robinson* (1817), 2 Johns. Ch. (N. Y.) 312, at 309.

way preventing him from getting at the real or personal property of the debtor and having it applied to the payment of the judgment. In such a case the filing of the creditor's bill creates no lien. The lien in such a case is created by the judgment itself as against the real property of the judgment debtor and by the execution in the case of personal property. Personal tangible property is subject to execution in New York state and in most of our states, therefore filing a creditor's bill will not create a lien upon it. Indeed an injunction issued upon a creditor's bill shall not be construed to prevent another judgment creditor who has a judgment from levying upon any property which his execution can reach, or which may be discovered by him.¹¹

It is very clear that as to personal property which is the subject of levy and sale on execution, a creditor by an equity suit acquires no preference, as against a judgment creditor of the debtor until the entry of an order appointing a receiver in such equity suit.¹²

The rule that by the commencement of an action in equity by a judgment creditor to reach the property of his debtor, he obtains a lien upon the choses in action and equitable interests of the latter, which lien becomes effectual upon the recovery of a judgment for the relief sought, is not to the same extent applicable to property subject to levy of execution,¹³ as for instance, tangible personal property.¹⁴

§ 452. Effect of Appointment of Receiver by Way of Equitable Execution—Real Estate. English Doctrine. In August, 1838, the English Parliament passed "An Act for abolishing arrest on Mesne Process in civil actions, except in certain cases,

¹¹ Albany Bank v. Schermerhorn (1840), Clark Ch. (N. Y.) 296.

¹² Lansing v. Easton (1839), 7 Paige 364; Davenport v. Kelly (1870), 42 N. Y. 199 and cases cited.

¹³ Knower v. Bank (1891), 124 N. Y. 559.

¹⁴ Bank v. Bank (1900), 127 N. C. 434, 37 S. E. 461.

for extending the remedies of creditors against the property of debtors and for amending the laws for the relief of insolvent debtors in England.”¹⁵ Until this act was passed no lien or charge was created over a defendant’s land by judgment. By sec. 110 of this act, a charge upon the real estate of a judgment debtor was for the first time created and was to take effect in favor of a judgment creditor who had entered up his judgment.¹⁶

By act of parliament therefore, a judgment creditor is given a general lien or charge on the defendant’s real estate under certain conditions. When a judgment creditor can not get at the defendant’s land because the defendant’s interest is an equitable one, then he applies to a court of equity for relief. It is the province of the court in such interlocutory applications to see that the property does not disappear between the time of making the application and the time of the trial. If the plaintiff has a right to equitable execution, it is because his right existed at the time of filing the bill. The right to take that property is established, if at all, at the trial or hearing of the cause, and it is the province of the court of equity to keep the property ready for him when the time of establishing his right arrives.¹⁷

There is no corresponding enactment applicable to defendant’s personal estate.¹⁸

In any case in which the judgment creditor must come in to equity to remove a legal impediment, the judgment and execution issued being the foundation of his right, it appears that the relief given is substantially a delivery in execution, whether in form it be a writ of assistance or of sequestration or the appointment of a receiver, the land would be necessarily bound by the order. The order of the court of chancery affects

¹⁵ (1838), 1 and 2 Vic., C. 110.

¹⁶ (1838), 1 and 2 Vic., C. 110.

Also see *Flegg v. Prentis* (1892),
II Ch. D. 431.

¹⁷ *Anglo-Italian Bank v. Davies*
(1878), C. A. 9 Ch. D. 286.

¹⁸ *Flegg v. Prentis* (1892), II Ch.
D. 431.

as to equitable interests what the action of the sheriff does as to legal estate.¹⁹

A judgment creditor, not being able to obtain relief at law under the old system, because his debtor had nothing but an equitable interest in the land, comes into a court of equity to obtain that relief which he could not obtain at law, and the moment he established the difficulty in his way at law, and the court made the order giving the right of possession of the land to the receiver appointed in his behalf, that order giving the right of possession to the creditor through the receiver was as much a delivery in execution of the land in which the debtor had only an equitable interest, as was the sheriff's return to the writ of *elegit* at law, that he had extended the land, a delivery in execution of lands in which the debtor had a legal interest. As soon as the order was given it bound the land, when the receiver's security was afterwards given it related back to the time when the order was made.²⁰

§ 453. Effect of Appointment of Receiver under Creditor's Bill—Real Estate. American Doctrine. See this matter discussed under ch. XX, sec. 466, title "Actual Possession of Real Estate by Receiver Not Necessary," and the American doctrine and American cases therein cited. It will be discovered that there is little fundamental difference between the English and American cases on the subject.

§ 454. Effect of Appointment of Receiver by Way of Equitable Execution—Personal Property. English Doctrine. A receivership order gives the person who obtains the order the right to execution on the property as soon as the legal impediments to execution have been removed; but it does not alter the property in the goods. It leaves the property in the goods where it was. It does not give the person who obtained the order any lien upon the goods, but it places them in custody

¹⁹ *Hatton v. Haywood* (1874), 9 Ch. App. Cas. 236.

²⁰ *Ex parte Evans* (1879), C. A. 13 Ch. 252.

of the receiver. Under such circumstances the debtor could not after the receivership order had been made make any disposition of his property, which should override the rights of the persons who were before the court for the purpose of obtaining that order.

The person who obtains the order acquires no property in, no lien, and no charge whatever on that which is the subject-matter of the order.²¹

An order appointing a receiver can only amount to a charge if it charges the person in whose hands the money is not to deal with it except in one way.²²

As pointed out in *re Shephard*,²³ an order appointing a receiver is not the same as taking out execution. It is simply an uncompleted process to obtain payment of money. What the creditors obtain by the appointment of a receiver is not even an equitable interest in the property, but a right to get it by process which is not yet complete. The right way to obtain equitable execution against money in the hands of third parties and owing to the judgment debtor is to file a bill not only against your debtor, but also against the person who has got the property which you want to attach.²⁴

Mere personal estates are not bound by a judgment unless there has been an actual delivery of them in execution.²⁵

The order appointing a receiver by way of equitable execution, if the stock in trade and other property of the debtor directs the person mentioned in it to receive the specified property without prejudice to certain rights, all further questions being reserved until the further orders of the court. It is equally plain that the order creates no lien on the debtor's property in favor of the receiver and it certainly

²¹ *In re Potts* (1893), C. A. 1 Q. B. 648, at 652; see *In re Beaumont* (1910), 79 L. J. Ch. 744.

²² *In re Potts* (1893), C. A. 1 Q. B. 648, at 659.

²³ *In re Shephard*, 43 Ch. D. 131.

²⁴ *In re Potts* (1893), C. A. 1 Q. B. 648, at 660.

²⁵ *Hatton v. Haywood* (1874), Law R. 9 Ch. 229, at 233.

creates none in favor of the judgment creditor who has no possession of the property.²⁶

Judgment creditors having a receiver appointed by way of equitable execution do not acquire anything in the shape of a charge on the property. They are in the position of judgment creditors who have recovered judgment and are attempting to obtain payment or satisfaction out of the assets of the debtor. They have not acquired an equitable interest in the property as distinguished from a right to get it by a process which was not yet complete. The right way to obtain equitable execution against money in the hands of trustees was to file a bill, not only against your debtor but also against the person who had got the property which you wanted to reach.²⁷

The order appointing a receiver prevents the debtor from dealing with the moneys to the prejudice of the judgment creditor and it also prevents any subsequent judgment creditor from gaining any priority over the creditor obtaining the order, if at the date when obtained the property of the judgment debtor can not be taken in execution or made available by any legal process.²⁸ Such an order gives the judgment creditors a right to have the property in dispute handed to them after a certain difficulty has been gotten rid of.²⁹

Until the order for payment is made, the receiver merely holds the property "in medio" as between the parties to the action, but when we come to determine their ultimate rights, we must have regard to whether or not the plaintiff had at the date of the appointment of the receiver, a right to execution. If the plaintiffs were entitled to execution upon the property taken by the receiver but for legal impediments, it follows that they were in equity entitled to the money which was the fruits of the property as and from the date of the receivership order.³⁰

²⁶ *In re Dickinson*, 22 Q. B. D. 187, at 192.

²⁷ *Croshaw v. Lyndhurst Ship Co.* (1897), II Ch. D. 160.

²⁸ *In re Marquis of Anglesey* (1903), II Ch. D. 727, at 731.

²⁹ *Levasseur v. Mason* (1891), II Q. B. 73, at 80.

³⁰ *Levasseur v. Mason* (1891), C. A. II Q. B. D. 72, at 82.

§ 455. Effect of Appointment of Receiver under Creditor's Bill—Personal Property. American Doctrine. Sometimes when a receiver is appointed before judgment to preserve the property, and most frequently in a creditor's bill after judgment, questions of priority arise between creditors claiming under the receivership and others claiming under sheriff's, marshal's levies or otherwise. In the case of personal property when does the court get such custodia legis of the property as cuts off the rights of others or prevents the rights of others attaching hostile to the receiver? For a full discussion of the subject, see ch. XI, p. —, under title, "Actual Possession of Personal Property—Different Views."

§ 456. Effect of Appointment of Receiver on Defendant's Patents. A patent monopoly can only be transferred in the manner prescribed by the laws of the United States (Rev. St., sec. 4898, U. S. Comp. Stat. 1901, p. 3387), namely, by a written instrument signed by the owner duly recorded. A patent privilege does not vest in a receiver merely by virtue of his appointment.³¹ such as to give the receiver the right to sue for infringement.³² A state court having jurisdiction of the parties may compel them to execute an assignment to the receiver.³³

§ 457. Effect of Appointment of Successor Receiver. The removal of one receiver and the substitution of another in his stead does not take the property out of the custody of the court nor change the custody of the court.³⁴

§ 458. Effect of Invalid Appointment. A receiver's possession is the possession of the court. Whether the court has the right in the particular case to appoint a receiver can not be

³¹ Dick v. Struthers, 25 Fed. 103.

³² Ball v. Coker (1909), 168 Fed. 304.

³³ Ball v. Coker (1909), 168 Fed. 304.

³⁴ State, ex rel., v. Reynolds (1907), 209 Mo. 161, at 174, 107 S. W. 487; Very v. Watkins, 23 How. 469; Shields v. Coleman, 157 U. S. 178, at 179, 39 L. ed. 660.

questioned directly by the receiver himself. He and his sureties are estopped from denying the jurisdiction of the court to make restitution of the property.³⁵ Upon the determination by demurrer, dismissal or otherwise of the litigation upon which his appointment was predicated, the money or property which he had received by natural equity and according to the usages and rules of equity should be returned to the party from whom it was taken.

“Jurisdiction to correct what has been wrongfully done must remain with the court so long as the parties and case are properly before it, either in the first instance or when remanded to it by an appellate tribunal.”³⁶

A receiver's duties as the depositing of the fund or property for the litigants and parties to the bill, cease when the litigation terminates as for instance, the complainant's bill goes out on demurrer. But the relations of the receiver to the court of chancery from which he received his appointment did not determine by such demurrer—the receiver's obligations to the court which appointed him continued until he had been dismissed by the court itself.³⁷

When a court attempts to reach out and take property which is not the subject-matter of the controversy, it goes outside its appointed sphere and its orders in respect to such property are nullities.³⁸ Such orders can be attacked collaterally as well as directly, at any time by anybody and in any proceeding where their validity is in issue.³⁹

Said the Supreme Court of Illinois in 1902, “Where the receivership is procured under the assertion of an unjust and wrongful claim, as finally found by the court, the costs of the receivership may be taxed against the complainant pro-

³⁵ *Baltimore B. & L. Assn. v. Alderson* (1900), 99 Fed. 489; *Beardsley Co. v. Ashdown* (1913), 80 S. E. (W. Va. Sup. Ct. App.) 128.

³⁶ *Northwestern Fuel Co. v. Brock* (1890), 139 U. S. 216, at 219, 35 L. ed. 151.

³⁷ *Field v. Jones* (1852), 11 Ga. 413, at 415; *Bank of Mississippi v. Duncan*, 52 Miss. 740.

³⁸ *Bowman v. Hazen* (1904), 69 Kan. 682, at 697, 77 Pac. 589.

³⁹ *Bowman v. Hazen* (1904), 69 Kan. 682, at 698, 77 Pac. 589, and cases cited.

curing the appointment of such receiver.”⁴⁰ Likewise the assertion of a fraudulent and void claim which is dismissed.⁴¹

Damages for Wrongful Receivership. Damages for wrongful appointment of a receiver have been allowed:

First. Injury to defendant’s possession during the time he was deprived of the occupation of such premises.

Second. The actual and necessary expenses which the defendant incurred in the employment of an attorney to resist said receivership and of the natural and necessary expenses of said attorney.

Third. The rental value of the premises during the entire period of the receivership.⁴²

§ 459. Effect of Appointment of Receiver on Creditor’s Claims. See ch. XXVII, “Intervention and Presentation of Claims.”

§ 460. Effect of Appointment of Receiver on Outstanding Checks. The Negotiable Law of New York provides that “a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check.”⁴³ This is but a statutory expression of what was before the Negotiable Instrument Act the law in New York state and elsewhere.⁴⁴

It has been ruled under the circumstances stated when a party keeps a general account subject to check with a bank

⁴⁰ Link Belt Mfg. Co. v. Hughes (1902), 195 Ill. 413, 63 N. E. 186; Hughes v. Link Belt Mch. Co. (1900), 95 Ill. App. 323.

⁴¹ Highley v. Deane, 168 Ill. 266, 48 N. E. 30. See McAnrow v. Martin, 183 Ill. 467, 56 N. E. 168.

⁴² Joslin v. Williams (1906), 76 Neb. 594, 107 N. W. 837, 112 N. W. 343. See Thornton-Thomas Co. v. Bretherton (1904), 32 Mont. 80, 80 Pac. 10; Lochhart v. Gee, 3

Tenn. Ch. 332; Terrell v. Ingersoll, 10 Lea 77; O’Mahoney v. Belmont, 62 N. Y. 133.

⁴³ Laws of 1897, p. 756, ch. 612, sec. 325.

⁴⁴ Bowker v. Haight & Freese Co. (1906), 146 Fed. 257; Attorney General v. Continental Life Ins. Co., 71 N. Y. 325; Florence Mining Co. v. Brown, 124 U. S. 385, 31 L. ed. 424.

and a receiver takes hold of the party's property, the bank asserting in good faith a lien may apply such funds to the indebtedness of the defendant as were actually in its possession at the time of appointment of a receiver. Deposits made after the appointment of receiver are the property of the receiver in his official capacity.⁴⁵ See sec. 461, *infra*.

La Comb, C. J., United States Circuit Court of Appeals, of Southern District, New York, held that an attorney retained as counsel for a corporation which went into the hands of a receiver who presented and received payment on a check after he had knowledge that a receiver had been appointed must pay over to the receiver the money so received.⁴⁶

§ 461. Effect of Appointment of Receiver on Lien on Bank Deposits. When receivers are appointed for an insolvent corporation, the rights of creditors are fixed by the facts as they then stand, and these rights can not be enlarged by subsequent events, such as the maturing of the notes held by banks after the appointment of receivers; for when receivers are appointed the assets of the corporation pass into the custody of the law to the same extent as in the case of a decedent's estate.⁴⁷

Banks who hold deposits of the corporation which at the date of the appointment of the receiver was not known to be insolvent, yet subsequently is found to be insolvent, can not set off such deposits against the amount of notes of the corporation held by them which were discounted before the appointment of the receiver, but did not mature until afterwards.⁴⁸

⁴⁵ *Horn v. Pere Marquette Ry.* (1907), 151 Fed. 626, at 629.

⁴⁶ *Bowker v. Haight & Freese Co.* (1906), 146 Fed. 257.

⁴⁷ *Blum Bros. v. Girard Nat. Bk.* (1915), 248 Pa. St. 148, at 156, 93 Atl. 940.

⁴⁸ *Blum Bros v. Girard National Bank* (1915), 248 Pa. St. 148, 93 Atl. 940.

CHAPTER XX

EFFECT OF APPOINTMENT OF RECEIVER AS TO CUSTODY OF THE COURT, POSSESSION, LIS PENDENS, TITLE AND LIENS

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CUSTODY OF THE COURT

§ 462. **Appointment of Receiver Gives Court Custody of Property.** The order of appointment of a receiver is in the nature of a sequestration rather than an attachment¹ (except possibly in mortgage cases and judgment creditors cases), that is, ordinarily the property received by the receiver is to be considered as not vested in the plaintiff because of the receivership, as is substantially true in attachment cases, but is held by the receiver in custodia legis, and there must be a further order of court before the property can be applied for the benefit of the party at whose instance the receiver was appointed. A receiver can not be any more the agent of the plaintiff than can a sequestrator.² Both receiver and sequestrator are officers of the court.

¹ Thompson v. Phoenix Ins. Co., 136 U. S. 287, 34 L. ed. 408; Hoare v. Owen (1892), 3 Ch. D. 94, at 99; Beverly v. Brooks (1847), 4 Gratt.

(Va.) 209; Johnson v. Garner (1916), 233 Fed. 756, at 776.

² Hoare v. Owen (1892), 3 Ch. D. 94, at 99.

The court itself takes custody of the property³ which is the subject of the suit, preserves it from waste or destruction, secures and collects the proceeds and profits and sometimes realizes or sells the corpus. As to the distribution of the money, it is not correct to say, as was said in *Beverley v. Brooks*,⁴ the appointment "gives in itself no advantage to the party applying for it over other claimants." The true rule, as shown by English and American cases, is "that where money is in the hands of a receiver, you must look in each case to all the circumstances and in particular to the nature of the action and the object of the appointment of a receiver," to ascertain the priorities on distribution.⁵

When land is in the hands of the court through a receiver, no one can take possession of that land and hold it adversely to the receiver without being guilty of contempt of the court, and it has been held that such a holding of land will not bar the running of the statute of limitations.⁶

§ 463. Meaning of Custody of the Court. A *pendente lite* receiver is appointed in an adversary proceeding upon application to the court or the judge in chambers. When the order is duly made, the property of the defendant covered by the order is said to be in the custody of the court. What is meant by this?

First. There is no change of the legal title.⁷ No livery of seizin has been made by the defendant, putting the legal title in the court or in the receiver.

Neither has the sheriff gone out on the property and made any levy or done any other act tantamount to a levy.

Neither, in ordinary cases, has the owner of the property executed a deed or other conveyance to the court or to the receiver.

³ *McKinnon Young Co. v. Stockton* (1908), 55 Fla. 708, 46 So. 87; *Gobble v. Orrell* (1913), 163 N. C. 489, 79 S. E. 957; *Weeks v. Weeks*, 106 N. Y. 626, 13 N. E. 96.

⁴ *Beverley v. Brooks* (1847), 4 Gratt. (Va.) 209.

⁵ *Hoare v. Owen* (1892), 3 Ch. D. 103.

⁶ *Gobble v. Orrell* (1913), 163 N. C. 489, 79 S. E. 957.

⁷ *Durand & Co. v. Howard & Co.* (1914), 216 Fed. 585, at 591.

It must therefore be that the original owner still has the purely legal title of the real property.

Second. Chancery courts, however, act by reason of grace or on the principles of doing for a litigant what ought to be done in honesty, equity and good conscience. Having the defendant and receiver before the court, the court orders the receiver to take possession and often enjoins the defendant and others from interfering with the receiver's possession. If the court should find and order the owner to hold this property for the plaintiff, then the plaintiff would have an equitable title. The court, however, takes a different step and orders the defendant to hold the title to the property itself, not only for the plaintiff, but for all who may, before the termination of the main suit, show a valid right to the property. And the court orders the receiver to take physical possession of the property as far as possible and to physically preserve it. The receiver's possession is by reason of an order of the court directed primarily against the defendant and indirectly against his property, therefore the receiver can at most have a quasi equitable title. The court, acting on the person who has the legal title to the property, mediately, though not immediately, affects the rights of real and personal property. The receiver, by a process of injunction against the legal owner and others, is not interfered with and only to that extent has the receiver a title.

§ 464. What Property in Custody of Court. The court acquires jurisdiction over the subject-matter of the suit by reason of the subject-matter being properly brought to the attention of the court by the petition and by service had on the defendant, either actual or constructive, giving the defendant knowledge of the plaintiff's demands and giving the defendant proper opportunity to make a defense. If the court appoints a receiver over property not so embraced in the petition, it would seem that the action is brought without authority and void. It would follow that an order appointing a receiver of property

not covered by the petition would be void as to that part not so covered, and such part would not be in custodia legis.⁸

The appointment of a receiver of the assets of a corporation, unless some deed or assignment is made to the receiver, can only cover and directly affect the assets of the corporation within the jurisdiction of the appointing court.⁹

POSSESSION

§ 465. Possession of Receiver. When the court appoints a receiver it ordinarily requires the parties to the action to give up possession to the receiver of all the property comprised in the order, and treats them as guilty of contempt if they refuse to do so. The court will grant a receiver a writ of possession or a writ of assistance,¹⁰ to enable him to recover possession, and it will order tenants to attorn to the receiver. So long as the property is within the territorial jurisdiction of the court, there is no difficulty, at least in theory, in putting the receiver in actual possession.

It is well settled that the court can appoint receivers over property out of the jurisdiction, based on the doctrine that the court acts in personam.¹¹

The court, however, in one jurisdiction does not and can not attempt by its order to put its own officer in possession of foreign property, but it treats as guilty of contempt any party to the action in which the order is made who prevents the necessary step being taken to enable the court's officer to take possession according to the laws of the foreign country.¹²

The appointment of a receiver is not in all cases a turning the party out of possession,¹³ as where a receiver is appointed of an infant's estate; in such case the receiver's possession is the possession of the infant, but in the appointing a receiver

⁸ *Railway Co. v. Whitaker*, 68 Tex. 630, at 637, 5 S. W. 448.

⁹ *Zacher v. Fidelity, etc.* (1901), 106 Fed. 593.

¹⁰ *Wyman v. Knight* (1888), 39 Ch. D. 165.

¹¹ *Maudslay v. Maudslay* (1900), 1 Ch. D. 611.

¹² *Maudslay v. Maudslay* (1900), 1 Ch. D. 611.

¹³ *Underground Electric Ry. Co. v. Owsley* (1909), 176 Fed. 26, at 38.

in an adversary suit, as where plaintiff in ejectment has recovered a verdict, the receiver's possession seems to be the possession of him that has the right.¹⁴

§ 466. Actual Possession of Real Estate by Receiver Not Necessary. It was said in 1879: "A receiver of land never takes actual possession; he only receives the rent."¹⁵ Where an order is made appointing a receiver and manager of a company's business, but not directing delivery up of possession to him, and thereupon the receiver and manager enters upon the company's premises for the purpose of managing and carrying on the business, there is no change of occupation.¹⁶ However, when necessary to preserve licenses or business, possession of a hotel or other property may be given by the court.¹⁷

The American doctrine of receivers taking possession of real estate is well stated by Mr. Justice Nelson:¹⁸

"If a complainant seeks to enforce an equitable claim, or a claim which is the subject of equitable jurisdiction against real estate, the court will take care not to interfere with the rights of a person holding a prior legal interest in the property. If the person holding the prior legal interest is not in possession, the equitable claimant against the property is entitled to the interference of the court, not only for the purpose of preserving it from waste, but for the purposes of obtaining the rents and profits accruing, as a fund in court to abide the result of the litigation.

"For until the person holding the legal interest takes possession, or asserts his rights to the possession, the accruing rents and profits present a question simply between the parties to the litigation. And a court will also appoint a receiver even against a party having possession under a legal title, if it is

¹⁴ *Sharp v. Carter* (1735), 3 P. Wms. 374, at 379.

¹⁵ *Ex parte Evans* (1879), C. A. 13 Ch. D. 255.

¹⁶ *In re Marriage Neave Co.* (1896), 11 Ch. D. 663,

¹⁷ *Charrington H. Co. v. Camp* (1902), 11 Ch. D. 390.

¹⁸ *Wiswall v. Sampson* (1852), 14 How. 63, 14 L. ed. 322.

satisfied such party has wrongfully obtained that interest in the property. Thus the court may appoint where fraud can be proved, and immediate danger is likely to result, if possession pending the litigation should not be taken by the court in the meantime.

“The effect of the appointment is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it.”¹⁹

“When the subject-matter is real estate which is taken into possession of the court pending the litigation by the appointment of a receiver, the title is bound from the filing of the bill, and any purchaser pendente lite, even if for a valuable consideration, comes in at his peril.”²⁰

Although a receiver generally takes possession, nevertheless, in a case of real estate neither a judgment creditor nor a receiver needs to take actual possession, and when a decree appointing a receiver by its terms takes from the defendant corporation all its assets and is accompanied by an injunction restraining the officers and agents of the company from exercising any control over the property, assets or books of the company, or from interfering in any manner with the control of the receiver, and enjoins all persons claiming to be creditors from instituting any suits, and from further prosecuting any suits theretofore instituted, such an order appointing a receiver operates as a sequestration of the property of the corporation, and especially is this so when it is plain that such is the intention and scope of the order, and in such cases to hold that the rights of parties are affected by the accident of whether the receiver is able on the instant to proffer his bond for approval, is illogical.²¹

¹⁹ *Wiswall v. Sampson* (1852), 14 How. 63, 14 L. ed. 322.

²⁰ *Wiswall v. Sampson* (1852), 14 How. 63, 14 L. ed. 322. See *Farmers L. & T. Co. v. Lake Street Ry. Co.*, 177 U. S. 51, at 61, 44 L. ed. 667; *Palmer v. Texas* (1908), 212 U. S. 118, at 129, 53 L. ed. 435.

²¹ *Temple v. Glasgow* (1897), 80 Fed. 447. See *Palmer v. Texas* (1908), 212 U. S. 118, at 129, 53 L. ed. 435; *Farmers L. & T. Co. v. Lake Street Ry. Co.*, 177 U. S. 51, at 61, 44 L. ed. 667.

§ 467. Actual Possession of Personal Property by Receiver.

Many courts make a distinction between cases of the appointment of a receiver over real estate and over personal property in the matter of the necessity of the receiver taking actual possession of the property. Under our modern recording laws the title to property is of record, and liens, encumbrances, *lis pendens*, etc., of record bind the property. Title to personal property is not as a rule of record, and, with few exceptions, liens, encumbrances, etc., on personal property can only be by change of possession of the res; levy and execution on personal property can only be by an actual taking of the personal property and actual notice.

There are all sorts of decisions in America on the question: Is actual possession of personal property by a receiver necessary to give the court such custody of the property as will cut off the right of a sheriff to levy on the property or cut off the right of third parties to interfere? A full discussion of the cases and principles follows, but the true rule would seem to be by analogy, not stronger as to the rights of a receiver without actual possession than the rule as to "*lis pendens*," which is as follows:

Rights to real property and personal chattels within the jurisdiction of the court and subject to its power may be affected by *lis pendens*, but not those rights acquired by the transfer of negotiable securities or by the sale of articles in market overt in the usual course of trade.²²

When the controversy arises between two courts of concurrent jurisdiction as to the right or custody of the res (a ship, for instance), as between two courts of concurrent and coordinate jurisdiction having like jurisdiction over the subject-matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and can not be deprived of its right to do so because it may not have first

²² Mr. Justice Bradley, in *Enfield v. Jordan* (1886), 119 U. S. 680, at 693, 30 L. ed. 523. See ch. XIX,

sec. 440, "Effect of Appointment of Receivers on Chattels."

obtained physical possession of the property in dispute. But where the jurisdiction is not concurrent and the subject-matter in litigation in the one is not within the cognizance of the other, while actual or even constructive possession may, for the time being, and in order to avoid unseemly collision, prevent the one from disturbing such possession, yet where there is neither actual nor constructive possession there is no obstacle to proceeding, and action thus taken can not be invalidated by relation.²³

Under such a ruling the appointment of a receiver over chattel property, even if the receiver has not had time or has not actually taken into his possession chattels, would take precedence over and be ahead of a levy by a sheriff after the appointment of the receiver, but before the receiver actually took possession. It would seem proper that priorities should not be determined by the fleetfootedness of a sheriff as compared with the activity or fleetfootedness of a receiver or his lack of such qualities.

(a) View as to Actual Possession Necessary. The decree appointing a receiver is a decree for the benefit of the parties to the suit; it is not to stay creditors. It is not like the case of an administrator's suit where the object is to administer the property equally among all creditors, but to do justice to the parties to the suit, and, therefore, until a receiver is actually in possession what reason is there why a creditor should be prevented from going on to recover his debt? ²⁴ It is settled law in England that an order appointing a receiver by way of equitable execution creates no change in personal estate.²⁵

To the same effect is an old Maryland case,²⁶ where the court held that the receivers never actually obtained possession of the credits of a certain bank or its books and papers or its evidences of debt; on the contrary, they were held adversely

²³ *Moran v. Sturges* (1893), 154 U. S. 283, 38 L. ed. 981.

²⁴ *Defries v. Creed* (1865), 34 L. J. Ch. 607; *Taylor v. Eckersley* (1877), 5 Ch. D. 740.

²⁵ *Richout v. Fowler* (1904), 1 Ch. D. 663; *Edwards v. Edwards* (1876), L. R. 2 Ch. D. 296.

²⁶ *Farmers Bank v. Beaston* (1836), 7 G. & J. 421.

to the receivers, therefore the appointment of a receiver and his giving bond did not prevent the goods, etc., from being attached.

A recent Virginia case followed the English case of *Edwards v. Edwards*,²⁷ and held that the appointment of a receiver of railroad property who did not take actual possession of the earnings of the road, or give bond, was not sufficient to prevent execution issuing against the personal property not so taken.²⁸

In *Moran v. Sturges*²⁹ it was held that physical possession of a vessel was taken by a marshal in a United States court on behalf of libellants and that his levy took precedence over the appointment of a receiver in a state court who had not taken actual possession.

In the cases cited the doctrine of *lis pendens* does not seem to have been invoked.

(b) View as to Actual Possession Not Necessary. Some American authorities do not seem to make the distinction between the receiver taking constructive and actual possession of real or personal property,³⁰ but hold generally, "While the receiver could not interfere with the property of the corporation until he filed his bond, yet after he filed his bond his title related back to the date of his appointment."³¹

Such cases hold the appointment of the receiver vests the property of the corporation in him, although he was to thereafter qualify by giving a bond, and the title being in him and the property in the custody of the law, no other court could obtain jurisdiction over the property after such an appoint-

²⁷ *Edwards v. Edwards* (1876), L. R. 2 Ch. D. 296.

²⁸ *Frayrer's Admr. v. Railway* (1886), 81 Va. 388.

²⁹ *Moran v. Sturges* (1893), 154 U. S. 256, 38 L. ed. 981.

³⁰ See *Chalmers v. Littlefield* (1907), 103 Me. 271, at 282, 69 Atl. 100; *Palmer v. Texas* (1908), 212

U. S. 118, at 129, 53 L. ed. 435; *Farmers L. & T. Co. v. Lake Street Ry. Co.*, 177 U. S. 51, at 61, 44 L. ed. 667.

³¹ *Rutter v. Tullis* (1852), 5 Sandf. 610; *Storm v. Waddell* (1845), 2 Sandf. Ch. 494; *Matter of Jensen Co.* (1891), 128 N. Y. 553, 28 N. E. 665.

ment, even under process upon which possession was taken prior to the qualifying of the receiver.³²

A judgment of a competent court of record becomes a general lien on the defendant's property within the territorial limit of the court. This is not by common law, but by statute, the first statute almost as old as the common law.³³ We know of no common-law doctrine or no statute which makes a judgment a general or special lien on personal property, although such lien may be obtained by actual levy. If a final order or judgment does not create a lien or charge on personal property until actual levy or execution or something which is tantamount to actual possession, it is hard to conceive how an interlocutory order directing the receiver to do something in an action in personam against the defendant can so put that property in custodia legis that a sheriff or marshal under certain circumstances³⁴ can not levy on it, or that an innocent purchaser for value shall have to give up the res.

In 1817 Chancellor Kent laid down the following rule relative to the doctrine of *lis pendens* as affecting personal property: "If Winter (the defendant in the suit which acted as a *lis pendens*) had held a number of mortgages and other securities in trust when the suit was commenced, it can not be pretended that he might safely defeat the object of the suit and elude the justice of the court by selling these securities. If he possessed cash as the proceeds of the trust estate, or negotiable paper not due, or perhaps movable personal estate, such as horses, cattle, grain, etc., I am not prepared to say, the rule is carried so far as to affect such sales. The safety of commercial dealing would require a limitation of the rule."³⁵

We can see no more reason why a bona fide purchaser of ordinary negotiable securities or such articles as are usually

³² *Matter of S. S. T. B. Co.* (1892), 136 N. Y. 174, 32 N. E. 623; *Maynard v. Bond* (1878), 67 Mo. 315; *Steele v. Sturges* (1857), 5 Abb. Pr. 442.

³³ *Bac. Abr. Tit. Execution.*

³⁴ *Moran v. Sturges* (1893), 154 U. S. 283, 38 L. ed. 981.

³⁵ *Murray v. Lylburn* (1817), 2 Johns. Ch. 441.

dealt in in market overt in the usual course of trade, should be obliged to search the records for a receivership order than that he should be required to search the records for a *lis pendens*.³⁶

§ 468. Actual or Constructive Possession of Receiver. Said the Supreme Court of Illinois: "It can make no difference in the application of the rule (unauthorized interference with the possession of the receiver) whether the property is actually or only constructively in the receiver's possession. Here the order appointing the receiver directed him to forthwith take possession, and, if necessary, to sue for and recover all the property of the railway company, whether real, personal or mixed, and whether in possession or action." * * * "The garnishee proceedings were a direct interference with the right of the receiver, since they attempted to deprive him of what was his under the order of appointment."³⁷

§ 469. Possession of Receiver Not to Be Disturbed. It was early settled in *Angell v. Smith*,³⁸ when the rule was laid down, both with respect to receivers and sequestrators, that their possession is not to be disturbed without leave. One having property belonging to a receiver must deliver it up.³⁹ But when a party is prejudiced by having a receiver put in his way, the course has been either to give him leave to bring ejectment or to permit him to be examined *pro interesse suo*, which may often be the most convenient mode. It would be extremely hard if the practice were different. The party would then be kept out of his possession, or if he proceeded at law, he would be liable to punishment for contempt of the court appointing the receiver.⁴⁰

³⁶ See *Enfield v. Jordan* (1886), 119 U. S. 680, at 693, 30 L. ed. 523.

³⁷ *Richards v. The People* (1876), 81 Ill. 551, at 555; *Sircomb v. Catlin* (1889), 128 Ill. 556, at 563, 21 N. E. 606.

³⁸ *Angel v. Smith* (1804), 9 Ves.

335; *Maudslay v. Maudslay* (1900), 1 Ch. D. 61.

³⁹ *Bowker v. Haight & Freese Co.* (1906), 146 Fed. 257.

⁴⁰ *Brooks v. Greathed* (1820), 1 J. & W. 178.

Property, both real and personal, in the custody of the law through a receiver is not subject to seizure and sale on execution.⁴¹

§ 470. When Receiver's Right of Possession Is Affected.

The receiver's right to the possession of the defendant's property dates from his appointment as receiver, and not from the commencement of the action in which he was appointed.⁴² The mere filing of a creditor's bill may not create a lien at the time,⁴³ even if a receiver is afterwards appointed. But when an injunction is allowed at the time of filing such creditor's bill and the defendants are prohibited and restrained from interference with or making disposition of any and all property whatever, a lien or what amounts to a lien would be established against defendant's property.⁴⁴

It has been held in Michigan: "The usual practice in suits by judgment creditors is to obtain in due season, where the facts warrant it, the appointment of a receiver who is to collect and apply the assets. The Statutes of Michigan do not, and the rules do not declare any lien to be created by merely filing a creditor's bill. Until the debtor is enjoined from dealing with the property, there is nothing in the law to prevent any honest disposition of it, and, until a receiver is appointed, there is nothing which will act on the property itself. Except for the statute a judgment creditor's bill is like any other suit—a mere personal litigation. Until the assets are arrested and held in some way, the death of the defendant leaves them subject to administration."⁴⁵

⁴¹ *Chalmers v. Littlefield* (1907), 103 Me. 271, at 282, 69 Atl. 100; *Walling v. Miller*, 108 N. Y. 173, 15 N. E. 65; *Wiswall v. Sampson*, 14 How. 52, 14 L. ed. 322; *Gilman v. Ketchum*, 84 Wis. 60, 54 N. W. 395.

⁴² *American Clay Mch. Co. v. New England, etc.* (1913), 87 Conn. 369-374, 87 Atl. 731; *Baldwin v. Spear Bros.*, 79 Vt. 43, 50, 64, 64 Atl. 235; *Van Alstyne v. Cook*, 25 N. Y. 489.

nois Steel Co. v. Putnam, 68 Fed. 515, 517.

⁴³ *German Am. Sein v. Saenger*, 66 Mich. 249, 33 N. W. 301.

⁴⁴ *Saginaw County Savings Bk. v. Duffield* (1909), 157 Mich. 522, 122 N. W. 186.

⁴⁵ *German Am. Sein v. Saenger*, 66 Mich. 249, 33 N. W. 301; *Jones v. Smith*, Walk. Ch. (Mich.) 115; *Saginaw County Savings Bk. v. Duffield* (1909), 157 Mich. 526, 122

§ 471. Where Receiver Holds as Bailee. The receiver with few exceptions takes only such rights in the property as were possessed by those for whose property he was appointed receiver.⁴⁶ Property which is held by the defendant as bailee may come into the hands of a receiver, and such receiver will hold as bailee. Where an intervenor establishes a right of possession and title superior to all others except the owner of a note and agreement of conditional sale, who retains the legal title subject to payment of the balance of the purchase price by the intervenor, equity will restore possession to the intervenor.⁴⁷

§ 472. Receiver Holding Property Subject to Vendor's Privilege. Under the Louisiana law, the vendors have the privilege of having the property sold for their payment.⁴⁸ A receiver who takes possession of property does so subject to the right of the vendor to intervene and have the property sold whenever his debt becomes payable.⁴⁹

It was also held by the Louisiana court that, in the absence of fraud in fact or in law, a pignorative contract in the form of a sale made in the usual course of business to secure advances, will be recognized and enforced as a pledge against creditors of the owner and against a receiver appointed to administer his insolvent estate.⁵⁰

§ 473. Receiver Holding Property Subject by Statute to Creditor's Claim. The State of Mississippi has a statute providing that "If a person shall transact business as a trader or otherwise with the addition of the words 'agent,' 'factor' and company, or '& Co.,' or like word, and fail to disclose the name of his principal or partner by a sign in letters easy

⁴⁶ *Morse v. Chapman*, 24 Ga. 249; *Crine v. Davis*, 68 Ga. 138; *Penton v. Hall* (1913), 140 Ga. 576, 78 S. E. 917; *In re John L. Nelson & Bro. Co.* (1907), 149 Fed. 594; *Wiswall v. Sampson*, 14 How. 64, 14 L. ed. 322.

⁴⁷ *Penton v. Hall* (1913), 140 Ga. 576, 78 S. E. 917.

⁴⁸ *Hudson v. Uncle Sam, etc., Co.* (1915), 136 La. 1071, 68 So. 129.

⁴⁹ *Thompson v. Southern Mill* (1909), 123 La. 127, 48 So. 769; *In re Receivership of August Sugar Co.* (1914), 134 La. 971, at 976, 64 So. 870.

⁵⁰ *Thompson v. Southern Sawmill Co., Ltd.* (1909), 123 La. 127, 48 So. 769.

to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name without any such addition, all the property, stock, money and choses in action used or acquired in such business shall as to the creditors of any such person be liable for his debts, and be in all respects treated in favor of his creditors as his property.”⁵¹

Under this statute the Supreme Court of Mississippi had before it a case in which a hardware company handled, as local agent of the International Harvester Company, gasoline engines and agricultural implements and placed these articles in the hardware store behind the sign of the hardware company. There was no sign of the Harvester Company except an advertising sign of the hardware company that it carried the products of the Harvester Company as part of its stock in trade. “This sign,” said the court, “was merely an advertisement of the hardware company and did not in any way disclose the private agreement between the hardware company and the Harvester Company that as to the parties to the contract the goods would remain the property of the Harvester Company. Wherefore a receiver of the hardware company was held to be entitled to possession thereof, notwithstanding a replevin suit by the Harvester Company commenced before the appointment of a receiver.”⁵²

§ 474. Receiver Holding Property Conditionally Sold to Debtor. Under a Missouri statute⁵³ (and most states have similar statutes) which declares an unrecorded chattel mortgage void against any other person than the parties thereto, strangers may not, but creditors of the mortgagor prior to the mortgage may levy process upon the mortgaged property before the mortgagee takes possession thereof; subsequent

⁵¹ Code of Mississippi (1906), sec. 4784.

⁵² P. E. Payne Hardware Co. v

International Harvester Co. (1916), 110 Miss. 783, 70 So. 892.

⁵³ Revised Statutes of Missouri (1909), sec. 2880.

creditors without process and subsequent purchasers in good faith may disregard or avoid the mortgage.⁵⁴

An assignee can not generally disregard or avoid such unrecorded chattel mortgage. An administrator or executor may generally disregard such an unrecorded mortgage because, by the law and practice of the state of Missouri, he represents and acts for the creditors.⁵⁵

Said Sandborn, J.:⁵⁶ "The position of a receiver in a suit brought by a creditor against an insolvent debtor for the appointment of a receiver, the administration and sale of the property and the distribution of its proceeds among the creditors is more nearly analogous to that of an administrator of the estate of a deceased person than that of an assignee for the benefit of creditors.

"He is appointed, his powers are conferred and his duties are imposed by the court and the law, and not by voluntary conveyance of the debtor. His primary duty is to hold, administer, convert into money and distribute the proceeds of the property for the benefit of creditors, for they have the larger and generally entire pecuniary interest in it."⁵⁷ * * * Such a receiver has the power of creditors "armed with process to disregard or avoid under the Missouri law the unrecorded condition in a contract of conditional sale to the debtor of personal property which the receiver finds in his possession and seizes there, even though no creditor had sued out any process before the seizure."⁵⁸ Likewise under the statutes of other states."⁵⁹ .

⁵⁴ First National Bk. v. Connett (1905), 142 Fed. 33, at 38, 5 L. R. A. (N.S.) 148; T. L. Smith Co. v. Orr (1915), 224 Fed. 71, at 72; Landis v. McDonald, 88 Mo. App. 335, 340; Williams v. Kirk, 80 Mo. App. 457, at 461.

⁵⁵ T. L. Smith v. Orr (1915), 224 Fed. 71, at 72.

⁵⁶ T. L. Smith v. Orr (1915), 224 Fed. 71, at 72; Hughes v. Menefee, 29 Mo. App. 192; Heinley v. Har-

mon, 103 Mo. App. 233, at 238 and 239.

⁵⁷ T. L. Smith Co. v. Orr (1915), 224 Fed. 71, at 73.

⁵⁸ T. L. Smith Co. v. Orr (1915), 224 Fed. 71, at 74.

⁵⁹ In re Wilcox v. Howe Co., 70 Conn. 220, 39 Atl. 163; Duplex Printing Press Co. v. Clipper Pat. Co., 213 Pa. 207, 62 Atl. 841; H. K. Porter Co. v. Boyd, 171 Fed. 305, at 313.

Some states have no conditional sale statutes, as, for instance, Delaware, and we therefore find holdings as follows: "The seller of machinery on trial loses none of his rights by the appointment of a receiver over the assets of the buyer if the machine was not in fact accepted by the buyer and the title did not pass. The receiver could not assert ownership as against the seller."⁶⁰

LIS PENDENS

§ 475. **Lis Pendens Common Law and Statutory.** The doctrine of lis pendens is of common-law origin,⁶¹ but has been extended to equitable proceedings,⁶² and may be fairly stated as follows: "Whenever, upon the face of the record, by the institution of a suit and service of process, it is shown that property or rights are to be affected, no one can deal with the property or those rights except subject to the suit; and if, after a person deals with the property, amendments are made upon the record which show that the particular property with which he has dealt is affected, when the original record did not, that he is not bound by virtue of lis pendens, because, having dealt in good faith with the property and there appearing nothing upon the records of the court to prevent any third party dealing with it, the record can not be amended so as to affect his rights, and it is for the reason that he is not at the time judicially informed of anything to prevent his dealing with the property."⁶³

The stringency of the common-law rule of lis pendens has led the English Parliament and the legislatures of many states to interfere, resulting in most material statutory modifications and restrictions.⁶⁴ The English Lis Pendens Statute was

⁶⁰ James Bradford Co. v. United Leather Co.; In re Turner Tanning Machinery Co. (1915), 97 Atl. (Del.) 620.

⁶¹ Crofts v. Oldfield (1676), 3 Swans. 278.

⁶² Wiswall v. Sampson (1852), 14 How. 52, 14 L. ed. 322.

⁶³ Gaylord v. Ry. (1875), 6 Biss. (U. S.) 286, at 293. See Hovey v. Elliott (1890), 118 N. Y. 124, at 138, 23 N. E. 475; Tilton v. Cofield, 93 U. S. 163, 23 L. ed. 858; Lamont v. Chesire, 65 N. Y. 26.

⁶⁴ Benton v. Shafer (1890), 47 O. S. 117, 24 N. E. 197.

passed in 1839 (2d & 3d Vic. ch. 11) and amended in 1860 (23d & 24th Vic. ch. 115).

The New York statutes on *lis pendens* were passed soon after the English *Lis Pendens* Act, and have been amended from time to time until now they are embraced in secs. 1670-1674 New York Civil Code.

The substance of the statute is that in an action brought to recover a judgment affecting the title to, or possession, use or enjoyment of real estate, the plaintiff may file with his complaint at the time of commencing it, or at any time afterward before final judgment in the county clerk's office of each county where the real estate is situate, a notice of *lis pendens*.⁶⁵

Wisconsin, California, Michigan, Minnesota and other states have followed the New York statute generally.

An inspection of the New York *lis pendens* statutes and those of states following New York disclose a very important fact: that a notice of *lis pendens* shall be recorded in the clerk's office of the circuit court in each county where the real estate sought to be affected is situated.

In other words, the general doctrine of *lis pendens* that every one in the state is presumed to know of legal proceedings in every part of the state is abrogated except where proper notice is properly given in each county wherein is situated the land to be affected.

An examination of the Ohio *Lis Pendens* Statute⁶⁶ discloses that it is little more than a codification of the general common-law doctrine on the subject, and few, if any, of the rigors of the general common-law doctrine are abrogated unless we read into the statute something which is really not there.⁶⁷

No federal statute covering *lis pendens* as applied by the United States courts has yet been passed, so that the common-law doctrine prevails in those courts.⁶⁸

⁶⁵ Sections 1670-1673, New York Civil Code, Parsons 1914.

⁶⁶ Ohio General Code, sec. 11300.

⁶⁷ As was possibly done in *Benton v. Shafer*, 47 O. S. 117, at 129, 24 N. E. 197.

⁶⁸ *Wiswall v. Sampson* (1852), 14 How. 52, 14 L. ed. 322; *Atlas Ry. Supply Co. v. Lake & R. Ry. Co.* (1905), 134 Fed. 503.

§ 476. **Lis Pendens Ceases after Judgment.** After a judgment is rendered lis pendens ceases.⁶⁹ The operation of a suit as notice ceases when it is brought to an end by a decree or judgment,⁷⁰ although a decree which may be reviewed by a higher tribunal is not final in this sense until sufficient time has elapsed for an appeal.⁷¹

§ 477. **Lis Pendens as Applied to Personalty.** There has been some question whether the doctrine of lis pendens applies to personal property as well as real estate. The common-law doctrine of lis pendens applied to real estate.⁷² The English Lis Pendens Act does not say particularly that it is only applicable to real estate, but the implication seems to be that it is.

The New York statute on lis pendens applies to titles to real estate.

That the so-called equitable lien of a judgment creditor or what was really lis pendens covered personal property, was decided by a number of old New York chancery cases,⁷³ which were decided before the New York Lis Pendens Statute was passed.

There is, however, an acknowledged exception, that is no lis pendens applies to negotiable paper.⁷⁴

The law as now laid down in the United States courts and the law which seems to be supported by the best reasoning of Chancellor Kent in 1815⁷⁵ and 1817 was stated in 1886

⁶⁹ *Turner v. Crebill* (1824), 1 Ohio 372.

⁷⁰ *Price v. White*, 1 Bailey's Eq. 234; *Baker v. Hayward*, 1 Bailey's Eq. 208.

⁷¹ *White and Tudor's Leading Cases in Equity*, 14th Am. Ed., Vol. 2, p. 1, pg. 201.

⁷² *Crofts v. Oldfield* (1676), 3 Swans. 278.

⁷³ *McDermott v. Strong* (1820), 4 Johns. Ch. 687; *Edmunton v. Lyne* (1829), 1 Paige 637; *Corning v. White* (1831), 2 Paige 567;

Farnham v. Campbell (1844), 10 Paige 598; *Bank v. Burke* (1835), 4 Black. 144; *Haddon v. Sprader* (1822), 20 Johns. R. 554.

⁷⁴ *Murray v. Lyleburn* (1817), 2 Johns. Ch. 441; *Boynton v. Rawson* (1841), 4 Clarke's Ch. 584; *In re Great West. Tel. Co.* (1873), 5 Biss. 363.

⁷⁵ *Murray v. Ballon* (1815), 1 Johns. Ch. 566; *Murray v. Lylburn* (1817), 2 Johns. Ch. 441. Commented on ably in *Warren County v. Marcy* (1877), 97 U. S. 96, at 105, 24 L. ed. 977.

by Mr. Justice Bradley, as follows: "Rights to real property and personal chattels within the jurisdiction of the court and subject to its power may be affected by *lis pendens*, but not those acquired by the transfer of negotiable securities, or by the sale of articles in market overt in the usual course of trade."⁷⁶

§ 478. Distinction between Effect of *Lis Pendens* and Receivership. The application of the principle of *lis pendens* proceeds no further than this: "Whenever, upon the face of the record, by the institution of a suit and service of process it is shown that property or rights are to be affected, no one can deal with the property or those rights except subject to the suit, and if after a person deals with the property, amendments are made upon the record, which show that the particular property with which he has dealt is affected, when the original record did not, that he is not bound by virtue of *lis pendens*; because having dealt in good faith with the property, and there appearing nothing upon the records of the court to prevent any third party dealing with it, the record can not be amended so as to affect his rights, and it is for the reason that he is not at the time judicially informed of anything to prevent his dealing with the property."⁷⁷

It will be noted that the individual plaintiff affects another person's property by his filing the suit, he does not place a lien or encumbrance or charge on the property, but he asks the sovereign to adjudicate rights concerning the property and by filing the suits gives notice to everyone in the sovereignty of what he prays for. The sovereignty would do a vain thing to adjudicate concerning property which has been disposed of or alienated since the suit was begun. Therefore the sovereign says: "Anyone dealing with such property after notice does so at his peril." But by the mere filing of the

⁷⁶ *Enfield v. Jordon* (1886), 119 U. S. 680, at 693, 30 L. ed. 523.

⁷⁷ *Gaylord v. Ry.* (1875), 6 Biss. (U. S.) 286, at 293.

suit the sovereign does not act or adjudicate or take the property into its custody.

The equitable rule which gives a receiver title to the debtor's property by relation as of the commencement of the action is one adopted to defeat fraudulent, unwarranted and unjust dispositions of the debtor's property and to accomplish just and equitable ends; but it is not applicable to a case where property has been legally disposed of under the direction of the court and certainly has no application to a case where property claimed by the receiver was subject to a lien in favor of mortgage creditors and was sold and disposed of by virtue of that lien during the pendency of the action, but before the final receiver actually took possession.⁷⁸

The protection which the doctrine of *lis pendens* gives to property in litigation is initiated by the act of the litigant in filing the suit. It is a notice of rights claimed by the litigant and the sovereign steps in at the moment of filing the suit and causing summons to be issued and says anyone who deals with the property after such notice may thwart the adjudication of the sovereign and therefore deals with the property at his peril.

The protection which the appointment of a receiver gives to the property is by the direct act of the sovereign making an order affecting the property either mediately or immediately; mediately if the property is outside the court's jurisdiction and sometimes immediately if the property is within the court's jurisdiction.

Dealing with property subject to *lis pendens* may be a violation of rights of the individual who brought the suit because he has asserted certain rights and the sovereign says after he has asserted such rights, he is to be protected. Dealing with property subject to *lis pendens* is not contempt of court or violating a right of the sovereign for the sovereign has not acted nor asserted any custody of the property.

⁷⁸ *Herring v. Ry.* (1887), 105 N. Y. 340, at 377, 12 N. E. 763.

Dealing with or taking or interfering with property in custody of the court under a receivership is contempt of court because the court has already acted in the premises and by the appointment of a receiver asserted dominion over the property.

Lis pendens is a doctrine of the common law but has been adopted as a rule or usage of equity. The appointment of a receiver was and is an equitable proceeding, but has by statute been adapted to certain courts other than purely equitable courts and the scope of receivership has been somewhat extended by statute.

The custody of the court which protects the property and as the courts say attaches when the receiver gives bond and relates back to the time when the appointment was made, is by reason of the jurisdiction of the court. As between two courts of concurrent and co-ordinate jurisdiction having like jurisdiction over the subject-matter in controversy, the court which first obtains jurisdiction is entitled to retain it without interference, and can not be deprived of its rights to do so because it may not have first obtained physical possession of the property in dispute.

But where the jurisdiction is not concurrent and the subject-matter in litigation in the one is not within the cognizance of the other, while actual or even constructive possession may, for the time being, and in order to avoid unseemly collision, prevent the one from disturbing such possession, yet where there is neither actual nor constructive possession, there is no obstacle to proceeding and action taken can not be invalidated by relation.

When a receiver appointed by a state court had not given bond and had not taken actual or constructive possession of certain vessels and a marshal under order from a United States court seized the vessels after the appointment was made and as the state court had no jurisdiction in personam against the libellant as holder of maritime liens therefore the state court unlawfully interfered with the United States marshal.⁷⁹

⁷⁹ *Moran v. Sturges* (1893), 154 U. S. 256, at 386, 38 L. ed. 981.

§ 479. **Lis Pendens Sometimes Binds Property in Receivership.** The appointment of a receiver is except in a few well defined cases,⁸⁰ predicated upon a main adversary suit. The appointment of a receiver is a provisional remedy applied for in this main suit generally upon motion of the plaintiff after the suit is properly brought. The doctrine of lis pendens must apply to this main suit as it does to any other suit.

If the suit concerns any real or personal property and this property is adequately described in the pleadings, such suit is notice to all the world of rights claimed by the parties to the suit during its pendency.⁸¹ It is presumed that legal proceedings during their continuance are publicly known throughout the realm.⁸² By the term realm is meant the state or sovereign where the property is.⁸³ If during the pendency of any action at law or in equity the claim to the property in controversy could be transferred from the parties to the suit so as to pass to a third party unaffected either by the prior proceedings or the subsequent litigation, then all transactions in our courts of justice would as against men of ordinary forethought prove mere idle ceremonies.⁸⁴

After a judgment creditor has filed his bill in equity to reach choses in action in the hands of trustees and service of subpoena, the trustee is affected with notice, if he parted with his trust property it would be at his peril.⁸⁵

The established rule is that lis pendens duly prosecuted and not collusive is notice to a purchaser so as to affect and bind his interest by the decree and the lis pendens begins from the service of the subpoena after the bill is filed.⁸⁶

⁸⁰ See ch. VI.

⁸¹ *Faulkner v. Vickers* (1894), 94 Ga. 531, 21 S. E. 233. See *Young v. Hamilton* (1910), 135 Ga. 339, at 346, 69 S. E. 593.

⁸² *Adams Equity*, sec. 157.

⁸³ *Carr v. Lewis Coal Co.* (1888), 96 Mo. 149, 8 S. W. 907.

⁸⁴ *Freeman on Judgment*, sec. 191;

Hovey v. Elliott (1890), 118 N. Y. 124, at 138, 23 N. E. 475, and cases cited.

⁸⁵ *Haddon v. Sprader* (1822), 20 Johns. 553, at 570.

⁸⁶ *Murray v. Ballou* (1815), 1 Johns. Ch. 566; see *Georgia Practice*, *Young v. Hamilton* (1910), 135 Ga. 339, at 346, 69 S. E. 593.

The filing of a creditor's bill by a judgment creditor operates as constructive notice and such judgment creditor acquires an equitable lien the moment of filing his bill in court.

It is frequently said that a judgment creditor gets an equitable levy or equitable lien or equitable execution on the judgment debtor's property when he has a receiver appointed, which levy, lien or equitable execution relates back to the time when he filed his bill. We find the term "equitable lien" first used by Vice-Chancellor William T. McCann, of New York, in 1839,⁸⁷ when referring to the right or priority under the doctrine of *lis pendens* which a judgment creditor obtained by filing his bill and properly describing the property of the defendant.

The word equitable lien has been frequently used subsequently and the term equitable execution and equitable levy by the mere filing of a creditor's bill. Such action by a creditor may be a *lis pendens*⁸⁸ but we believe such terms as equitable levy, execution and liens are used in a very broad sense in such cases and really mean such rights as the plaintiff gets under the doctrine of *lis pendens* by filing his bill.

A case presented itself in the United States District Court for the Northern District of Ohio wherein a petitioner filed a creditor's bill against a corporation.

It may be noted that there is no United States statute governing *lis pendens* and this court did not say whether or not he considered the Ohio statute as applicable, nevertheless he held the property bound by the doctrine of *lis pendens*, although a creditor's bill was filed. The report does not show it yet the property of the defendant, was most apparently described in the bill.

In this case a receiver was appointed for all the property and assets of a railway company, injunction was issued against the officers and agents of the railway company from in any wise

⁸⁷ *Scudder v. Van Amburgh* (1839), 4 Ed. Ch. 27.

⁸⁸ *Atlas Ry. Supply Co. v. Lake & R. Ry.* (1905), 134 Fed. 503.

interfering with the management of the property by the receiver. Subsequently one Berk loaned money to the company, took a promissory note and a mortgage covering property of the company in Summit county. The record of Summit county showed the title free and clear of all incumbrance. Berk had no knowledge of the pending suit in Cleveland, Cuyahoga county.

Held by Wing, J., as follows: A suit affecting title to property in a federal court, is constructive notice of *lis pendens* with respect to all properties in the district and division.⁸⁹

The theory upon which relief is given under a so-called creditor's bill or a bill brought by one creditor in behalf of all for the administration of the assets of an insolvent corporation is that such assets form a trust fund, of which the creditors are the *cestui que trustent*. In order to administer this trust, receivers are appointed to preserve the property pending the ascertainment of the rights of creditors as to the priority and amount.

§ 480. *Lis Pendens* Amply Protecting Property Precludes Receivership. If the plaintiff in the suit or any one else demanding a receiver has ample protection in the main suit under the doctrine of *lis pendens*, and the statutes governing the same, he has an adequate remedy at law and should not ordinarily have the assistance of a court of equity by the appointment of a receiver.⁹⁰ A careful reading of these cases will disclose that alienation of the property was feared. *Lis pendens* will very often prevent alienation but a receiver does more than prevent alienation of the property, he physically protects the property.

TITLE

§ 481. How Property Is Bound by Appointment of Receiver. If no conveyance is made to the receiver by the owner of the

⁸⁹ *Atlas Ry. Supply Co. v. Lake & River Ry. Co.* (1905), 134 Fed. 503.

⁹⁰ *Gregory v. Gregory* (1871), 33 N. Y. Sup. Ct. 1; *Mills v. Mills* (1860), 21 How. Pr. (N.Y.) 497.

property, it is a little difficult to say what the receiver's status is relative to the property. One court has said he is a caretaker. When the court fully determines the case in which the receiver was appointed and makes a final decree concerning the title to the property involved, such court order may establish an equitable title to the property. The order appointing the receiver, however, is not a final order, it should not determine any final right and should not prejudice the final adjudication of rights. Therefore it is difficult to say that the order appointing a receiver even establishes an equitable title in the receiver. What the court does is to act on the conscience of the owner and order him and others not to interfere with the property, and if he or others interferes, he or they commit an act or acts of contempt of the court. The receiver is ordered to take the property and will be assisted by the court to accomplish this. But, by the mere appointment, no decree is made changing the title to the property,⁹¹ or even establishing an unqualified equitable title in the receiver. When the case is finished, a final decree may establish an unqualified equitable title in some one.

§ 482. Property in Hands of Receiver Bound by Doctrine of Notice. The doctrine of *lis pendens*, which was originally a legal rule, has been adopted by courts of equity. And a suit affecting title to property in a federal court, is constructive notice of *lis pendens* with respect to all property in the district and division. B purchased from a corporation in the hands of a receiver appointed by the United States Circuit Court, Northern District of Ohio, Eastern Division, at Cleveland, Ohio. B shows in his bill that he relied upon an examination of the records of Summit county and in no wise examined the records of the United States Court in Cleveland, Cuyahoga county. B omitted to do those things which would have given

⁹¹ *Underground Electric Ry. Co. v. Owsley* (1909), 176 Fed. 26, at 38.

him actual notice of at least a cloud upon the Summit county property.⁹²

The Supreme Court of the United States, in *Wiswall v. Sampson*, 14 How. 52, said: "The settled rule also appears to be that where the subject-matter of the suit in equity is real estate, and which is taken into the possession of the court pending the litigation, by the appointment of a receiver or by sequestration, the title is bound from the filing of the bill, and any purchaser pendente lite, even if for a valuable consideration, comes in at his peril."⁹³

Lis pendens applies to property described in the pleadings, and such property, to be bound, should be carefully described in the petition asking for the appointment of a receiver.

§ 483. Property in Foreign Jurisdiction Affected Mediatly by Doctrine of Notice. The latest decisions in England are to the effect that a court of equity acting in personam can appoint a receiver affecting land abroad, but the decree in England does not bind the land abroad.⁹⁴

"It is said that it is doubtful, if not deniable, that courts of equity here (in England) can appoint a receiver in a foreign country or a foreign state. This practice of the courts is strong against this doubt and in favor of the affirmative of the proposition citing a number of cases where a receiver was appointed in a foreign state.

"All these cases show that acting in personam, that is through the medium of its power over the person, the courts of equity in this country (England) mediatly, though not immediately, affect the rights of real property abroad. They can not immediately affect it, because their decree does not bind the land."⁹⁵

⁹² *Atlas Ry. Supply Co. v. Lake & River Co.* (1905), 134 Fed. 503. See sec. 479, *supra*.

⁹³ 2 *Daniels Pr.* 1267-1057-1984; *Francklyn v. Calhoun*, 3 *Swans*. 278, N. 298; *Anonymous* (1801), 6 *Ves.* 287; *Angel v. Smith* (1804),

3 *Ves.* 335; *Hitz v. Jenks* (1901), 185 U. S. 155, 28 L. ed. 592, 4 Sup. Ct. Rep. 698.

⁹⁴ *In re Britannia Mining Co.* (1912), 197 Fed. 459.

⁹⁵ *Houlditch v. Donegal* (1854), 8 *Bligh's New Reports* 301, at 344.

“The receiver is not put in possession of foreign property by the mere order of court. Something else has to be done and until that has been done in accordance with the foreign law, any person, not a party to the suit, who takes proceedings in the foreign country is not guilty of a contempt either on the ground of interfering with the receiver’s possession or otherwise.

“The court will grant a receiver a writ of possession or a writ of assistance, to enable him to recover possession, and it will order tenants to attorn to the receiver. So long as the property is within the territorial jurisdiction of the court, there is no difficulty, at least in theory, in putting the receiver in actual possession.”⁹⁶

Where the defendant or if a corporation, its officers and registered office is in the court’s jurisdiction, and the property outside of the court’s jurisdiction, the receiver when appointed can not, of course, be put in possession by the court. The practice in such a case is for the court to order the defendant company to execute a power of attorney to someone in the foreign jurisdiction to take possession of the property on behalf of the receiver appointed in the home jurisdiction, the plaintiff to indemnify the defendant company in respect to the acts of such attorney in fact.⁹⁷ It is well settled that the court can appoint receivers over property out of the jurisdiction. This power I apprehend is based upon the doctrine that the court acts in personam. The court does not and can not attempt by its power to put its own officer in possession of foreign property, but it treats as guilty of contempt any party to the action in which the order is made who prevents the necessary steps being taken to enable⁹⁸ its officer to take possession according to the laws of the foreign country.⁹⁹ The receiver is not put in possession of foreign property by the

⁹⁶ *Maudslay v. Maudslay & Sons* (1900), 1 Ch. D. 602.

⁹⁷ *In re Huinac Copper Mines, Ltd.*, W. N. (1910), 218.

⁹⁸ *Maudslay v. Maudslay* (1900), 1 Ch. D. 602, at 611.

⁹⁹ *In re Maudslav Sons & Field*, (1900), 1 Ch. D. 602, at 611.

mere order of court. Something else has to be done and until that has been done in accordance with the foreign law, any person not a party to the suit who takes proceedings in the foreign country is not guilty of contempt either on the ground of interfering with the receiver's possession or otherwise.

§ 484. No Change of Title by Appointment of Receiver. The ordinary method of transferring the legal title to real estate is by deed or will, also by sale under legal execution. When a receiver is appointed over property, unless the owner of the property makes a conveyance to the receiver, there is no change of the legal title to the property.¹ Equity acts in personam,² and in theory acts on the conscience of the party before the court. An order appointing a receiver should and generally does include an order upon the defendant to surrender all books, papers, rights, interests and property, both real and personal, to the receiver; also an order to the receiver to take possession of the same; also an injunction issuing to the defendant and every one else not to interfere with the receiver's possession. These orders and injunctions do not of themselves vest the title to the property in the receiver, or change the legal title at all.³

§ 485. No Legal Title Vests in Receiver Pendente Lite. The original and primary jurisdiction of the chancellor's court in receivership cases was in personam merely.⁴ A receiver has no title to the fund, but simply acts as the arm of the court.⁵ In the absence of some conveyance a statute vesting the property of the debtor in him, he can not sue in the courts of

¹ *Pennsylvania Steel Co. v. New York City* (1912), 198 Fed. 721, at 728, and cases cited; *St. Louis, etc., Ry. Co. v. Whitaker* (1887), 68 Tex. 630, at 637, 5 S. W. 448; *Heffron v. Gage* (1894), 149 Ill. 182, at 193, 36 N. E. 569.

² *Durand & Co. v. Howard & Co.* (1914), 216 Fed. 585, at 591.

³ *Bank v. McLeod* (1882), 38 O.

S. 174; *Durand & Co. v. Howard & Co.* (1914), 216 Fed. 585, at 591; *State v. Small* (1918), 199 S. W. 127.

⁴ *Booth v. Clark* (1854), 58 U. S. 321, at 331, 15 L. ed. 164; *Durand & Co. v. Howard & Co.* (1914), 216 Fed. 585, at 591.

⁵ *Hale v. Allison* (1902), 188 U. S. 56, 47 L. ed. 380.

a foreign jurisdiction upon the order of the court which appointed him, to recover the property of the debtor.⁶

A receiver *pendente lite* is a person appointed to take charge of the fund or property to which the receivership extends while the case remains undecided. The title to the property is not changed by the appointment.⁷ The receiver acquires no title, but only the right of possession as the officer of the court. The title remains in those in whom it was vested when the appointment was made. The object of the appointment is to secure the property pending the litigation, so that it may be appropriated in accordance with the rights of the parties as they may be determined by the judgment of the action. Such was held in the case of a receivership of a partnership.⁸

The analogy between the title of an assignee and a receiver to property is not complete. It is not open to debate that title to the debtor's property does not vest in the receiver but remains in the debtor (except when the receiver is appointed in special cases, as in proceedings to dissolve a corporation, etc.), subject to the possession and control of such receiver, until he sells the property under the direction of the court, when the title passes to the purchaser.⁹

§ 486. Title in Receivership Affected Indirectly. All persons and property within the realm or state are subject to the sovereign power of the state and the laws thereof, provided such laws are not in contravention of the constitution and laws of the realm or of the United States or of the constitution of the state. The state constitutions granted judicial power to certain courts or gave the legislature power to establish courts. All property in the state is held subject to the right of the sovereign power to take that property from

⁶ *Great Western M. Co. v. Harris* (1904), 198 U. S. 561, at 574, 49 L. ed. 1163. See *contra*, *Bank v. McLeod* (1882), 38 O. S. 174.

⁷ See *contra*, *Gibson v. Gutru* (1909), 83 Neb. 718, 120 N. W. 201, where the court says, however, as follows: "The legal title to the note

in question was first in the investment company and is joined to the receiver by virtue of his appointment."

⁸ *Keeney v. Home Ins. Co.* (1877), 71 N. Y. 387, at 401.

⁹ *The State Nat. Bk. v. Esterley* (1903), 69 O. S. 24, 68 N. E. 582.

the present owner by due process of law. The appointment of a receiver does not take the title to the property away from the present owner; that can not be done by an interlocutory decree, but only by a final decree, after the then present owner has had full opportunity to be heard. The law, however, after suit is brought, does protect the title to the property from alienation by the doctrine of *lis pendens*, and equity, by an interlocutory order, protects the physical status of the property and preserves the rents, income and other incidents of the property by the appointment of a receiver or manager to perform the active duties relative to the preservation of the property, which active preservation the rule of *lis pendens* would not and could not accomplish. Finally, when the defendant has had a proper opportunity to be heard, a final decree or judgment is entered either ordering the property sold or decreeing that some party to the suit is the real owner.

Neither by the common law nor by the usages of equity, unaided by statute, does this sale or this decree vest in the purchaser or successful party to the suit a legal title. But the court having jurisdiction of the parties, says the purchaser or successful party to the suit has the right to have the land.¹⁰ the original owner shall not interfere with the party to whom equity has given the property. And, therefore, by a process of injunction, the new owner is not interfered with and only to that extent has he title. And in case of a sale by a receiver, the decree binds the world under general notice.¹¹ Receiver takes what title he gets by operation of law.¹²

§ 487. Title in Receivership Affected by Oral Appointment.

Does the order of the court take effect when it is given orally, when signed or when entered on the journal of the court? Ohio General Code, sec. 11604, provides that all judgments and orders must be entered on the journal of the court. In

¹⁰ *Winborn v. Gorre* (1843), 3 Iredell Eq. (N. C.) 117.

¹¹ *Brown on Jurisdiction*, sec. 280.

¹² *White v. Ewing* (1894), 159 U. S. 36, at 40, 40 L. ed. 67.

Coe v. Erb, 59 O. S. 263, it is held that execution on a judgment may not properly issue until the judgment has been duly entered and goods and chattels even can not be seized in execution upon the mere announcement of judgment by the court, also that, until the judgment is entered, it is only inchoate, it is not complete. All men must take notice of the entries of judgment in the common pleas court. A person by the ordinary inquiry, that is, an examination of the records, can ascertain the condition of titles.

To bind a stranger to the suit, it would therefore seem that the order of the court appointing a receiver should date from the time when it was entered, which might be subsequent to when the order was given.

In State of Ohio, etc., v. Ham. Co., 7 O. 134, Hitchcock, J., says: "The announcement from the court in session that A B is appointed clerk, vests no such right as precludes the court from subsequently refusing to have the appointment entered on the minutes."

The direction of a judge, "Enter," is only the clerk's authority for spreading the matter on the journal of the court and that will be presumed without an entry of the judge's direction.

In Horn v. Pere Marquette R. Co., 151 Fed. 626, an order appointing a receiver, signed by a circuit judge at chambers in another district, on presentation to him of bill and answer, which have not been filed, to take effect when the pleadings and order are filed with the clerk, became effective on such filing, any delay in transcribing the order upon the records or in the qualification of the receiver being immaterial.

§ 489. Title Vests in Receivers of Corporations after Dissolution. Neither by common law, nor by the rules and usages of equity did courts of law have power to dissolve corporations created by the sovereign power of the legislature. But most states have passed statutes giving courts, by following the statute, the right to dissolve corporations. When legislatures

have created corporations they may provide the means and ways of dissolving them. They may also prescribe that the property after dissolution may vest in a receiver appointed by the court.¹³

§ 490. Qualified Equitable Title Vests in Receiver. Since the constitution of the United States provides that no person shall be deprived of life, liberty or property without due process of law, it is hard to conceive how the state, acting through the court, can in an ordinary proceeding absolutely divest the title to property, either real or personal, from the owner in a mere summary proceeding, often *ex parte*, and vest the property in a receiver. This is done by statute in New York under supplementary proceedings after judgment, and it is done in Ohio and other states when a corporation has been dissolved.

Supplemental proceedings, or proceedings in aid of execution as they are sometimes called, are brought after final judgment, in which case the defendant has had due process of law, therefore by statute a receiver might have title. As to a receiver when a corporation has been dissolved, this is also after due process of law, and furthermore, a corporation is a creature of the state and the creator can say where title shall vest when the corporation is dissolved, for title can no longer remain in a creature which has no being.

When a receiver *pendente lite* is appointed, the legal title remains in the individual or corporation whose property is placed in the hands of a receiver. However, the receiver has complete dominion over the property, subject to the orders of the court; he holds it for the benefit of others; he has possession. All the title, if any, which remains in the individual or corporation is merely the formal legal title which is held by it in trust for the receiver, which title it could be compelled

¹³ Ohio General Code, sec. 11938 et seq. See *Zacher v. Fidelity*, etc. (1901), 106 Fed. 593, discussing Connecticut statute. See also *Bern-*

heimer v. Converse (1906), 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755, Minnesota statute.

by the court at any time to convey to the receiver¹⁴ for the purposes of the trust. The receiver must therefore have the equitable title because the court has imposed on the property an equitable trust. And this is a qualified equitable title because it is the subject of an interlocutory decree. An absolute equitable title, when a creature of the court, is generally the subject of a final decree.

§ 491. Title of Receiver in Supplementary Proceedings.

Under the old chancery practice in New York, "before the Code of 1848, a common-law receiver (that is a non-statutory receiver) did not take title to the debtor's real estate, by virtue of his appointment, nor under an ordinary assignment, except when the court specially directed the debtor to convey his real estate to the receiver."¹⁵

Under the old New York rule, therefore, "the personal estate became vested in the receiver from the time and by virtue of his appointment; the real estate only by virtue of a conveyance to him which the court had power to compel and in this way the satisfaction is worked out."¹⁶

In 1862, however (Laws 1862, ch. 460, sec. 15), the legislature of New York passed a law requiring that the order for the appointment of a receiver in supplementary proceedings shall be filed and recorded in the office of the clerk of the county where the judgment roll is filed, and also that a certified copy of such order be filed and recorded in the office of the clerk of the county in which any real estate of the debtor sought to be affected by such order is situated and also in the office of the clerk of the county in which the debtor resides, and that real property is vested in the receiver only from the time of filing the order of appointment, etc. (Laws 1863, ch. 392, sec. 1, p. 661).¹⁷

¹⁴ *Matter of Attorney General v. Atlantic Mut. L. Ins. Co.* (1885), 100 N. Y. 279, at 283, 3 N. E. 193.

¹⁵ *Moak v. Coats* (1860), 33 Barb. 498.

¹⁶ *Chautauqua Bk. v. Risley* (1859), 19 N. Y. 374.

¹⁷ *New York Civil Code, Parson's* (1914), 2468.

A receiver appointed in supplementary proceedings was held to take title to the lands of the debtor, and the court at the same time held that they were not dealing with the ordinary powers of a court of equity.¹⁸

However, in 1895, the Court of Appeals of New York, referring to this section, par. 2468 of the Code of Civil Procedure, said: "It is true the Code of Civil Procedure (Parsons [1914] 2468) provides that on filing the order appointing the receiver, or a certified copy, in the county where the property is situated, the real property is vested in the receiver. This section, however, is to be read and construed in connection with the other provisions of the statute and can not be taken literally.

It must be constantly kept in mind that the receiver is appointed in proceedings supplementary to execution and takes no such absolute title as would enable him to sell it when it is subject to the lien of judgments. The receiver's title to real estate is a qualified one in the nature of a security for the plaintiff in the judgment; it does not divest the debtor of the legal title, but the latter's conveyance of the premises would be subject to the claim of the receiver.¹⁹

It is therefore only by reason of the statute that receivers take title to real property in supplemental proceedings.²⁰

§ 492. Time of Vesting of Receiver's Title in Supplementary Proceedings. The status of the property and the relations toward it of all parties interested in it, are fixed by the order appointing a receiver and the conditions are not changed by an order providing that the receiver shall give bond for the faithful discharge of his duties in order that the property may be secured and the rights of creditors therein secured. The reason for this rule is clear. The object of the appointment of a receiver is to preserve equally among the creditors by preventing a multiplicity of suits, and some creditors from

¹⁸ *Wing v. Dusse* (1878), 15 Hun 190.

¹⁹ *Faneuil Hall Nat. Bk. v. Buss-*

ing (1895), 147 N. Y. 665, 42 N. E. 345.

²⁰ *People v. President* (1885), 100 N. Y. 279, at 283, 3 N. E. 193

obtaining advantages over others. If the jurisdiction of the court over the property did not attach contemporaneously with the order appointing a receiver, the purpose of the court in appointing a receiver might be defeated by the failure of the person appointed receiver to accept the position, or his inability to give the bond required. Or, in the interim between the order appointing a receiver and his giving the required bond, a creditor might obtain an advantage by securing a confession of judgment, and in innumerable other ways.²¹ The order for the appointment of a receiver, followed by the consummation of the appointment by the giving of a bond, vests the estate of the judgment debtor in such receiver as of the date of the order, without the execution of any transfer or assignment.²² By the date of the order we mean the time the order is entered on the records of the court.²³ Says Judge Lurton: "The qualified title of a receiver to the property he is directed to take and hold relates back to the time of his appointment and actual seizure by him is not necessary to cut off rights which attach only after the order of appointment."²⁴

A distinction must be made in the matter of the vesting and the time of vesting of a receiver's qualified title in real and personal estate and whether it is located within or without the jurisdiction of the appointing court.²⁵

§ 493. Title Vests in Receiver Sometimes by Statute. In Delaware²⁶ and other states, there are statutes vesting in receivers the title to all the assets of the company by operation of law and without a transfer except real estate outside the state. This of course does not invalidate any liens or pledges

²¹ Connecticut River B. Co. v. Rockbridge (1895), 73 Fed. 709; affirmed (1897), 80 Fed. 441.

²² Wilson v. Allen (1849), 6 Barb. 542.

²³ Maynard v. Bond, 67 Mo. 315.

²⁴ Horn v. Pere Marquette, 151 Fed. 633.

²⁵ See ch. XIX and XX, particularly sec. 465, et seq.

²⁶ Chapter 194, Vol. 27, Laws of Delaware, p. 479, approved March 19, 1913.

of such property.²⁷ These statutes are generally only applicable to corporations.

§ 494. Title, So-Called, of Receiver, to Promissory Notes of Debtor. A receiver of an insolvent corporation appointed by a federal court under its equity power when he takes possession of promissory notes belonging to the corporation does not take his authority as an ordinary endorsee of the papers and subject to the disability to sue in the federal courts, which attaches to such endorsee, but he takes by operation of law and as an instrument of the court which appointed him.²⁸

§ 495. Title, So-Called, of Receiver, to Personalty. As early as 1859 Comstock, J., of the Supreme Court of New York state in a case which was a creditor's bill in the nature of a supplementary proceeding with a receiver appointed, said: "The personal estate becomes vested in the receiver from the time and by virtue of his appointment; the real estate only by virtue of a conveyance to him which the court has power to compel; and in this way the satisfaction is worked out."²⁹ Since his decision New York statutes have been passed defining when and how a receiver shall be vested with the property.³⁰

§ 496. Title, So-Called, of Receivers, Subject to Existing Liens and Equities. A receiver takes possession of the property or the title to the property as some of the cases says, subject to all the liens and equities which existed at the time it is taken over by the receiver. He does not take over any more title than the person, firm or corporation had.³¹

²⁷ *Fell v. Securities Co. of North America* (1915), 95 Atl. 345.

²⁸ *White v. Ewing* (1894), 159 U. S. 36, at 39, 40 L. ed. 67.

²⁹ *Chautauqua County Bk. v. Risley* (1859), 19 N. Y. 369; at 374, 75 Am. Dec. 347.

³⁰ *Hayes v. Brickley* (1877), 63 How. Pr. 173, at 187; *Bostwick v.*

Menck (1869), 40 N. Y. 383, at 384; *Tradesmen's Nat. Bk. v. McFeely* (1875), 3 Hun 699, at 701.

³¹ See *In re Farmers & Merchants Bank* (1916), 160 N. W. 601; *Wisconsin, etc., Bank v. Manistee, etc., Co.*, 77 Mich. 76, 43 N. W. 907; *Rickman v. Rickman*, 180 Mich. 224, at 250, 146 N. W. 609.

§ 497. Title, So-Called, to Personalty, Sufficient to Maintain Trover. It has been held by the United States Circuit Court of Appeals, Second District, that the receiver of an insurance company could maintain trover for the conversion of securities the title to which and possession of which before the receivership was in the insurance corporation,³² likewise the receiver of a railway company.³³

§ 498. Title, So-Called, of Receiver, to Choses in Action of Defendant. Money due a company or individual for a sale by the company or individual before the receivership is a chose in action which passes to a receiver of the company³⁴ or to a receiver of an individual business. It is, therefore, the duty of the receiver to collect such chose in action. Such a chose in action passes to the receiver subject to all equities by way of set-off or otherwise, which exist between the company and the debtor.³⁵ What title a receiver gets to the choses in action of the defendant he gets by operation of law.³⁶

LIENS

§ 499. Lien on Property Not Generally Affected by Receivership. A lien is in the nature of a contract either express or implied between the lienor and lienee. Courts will uphold and enforce contracts rather than impair them. Contracts can only be impaired by acts of the parties. Prior liens are therefore not divested by the appointment of a receiver in cases in which the lienholders are not parties and have not had their day in court.³⁷

³² *Ballard v. Audubon Nat. Bk.* (1915), 222 Fed. 57.

³³ *Smith v. Texas & N. O. R. Co.* (1908), 101 Tex. 405, 108 S. W. 819.

³⁴ *Rochester Tumbler Wks. v. M. Woodbury Co.* (1913), 215 Mass. 194, at 198, 102 N. E. 438.

³⁵ *Rochester Tumbler Wks. v. M. Woodbury Co.* (1913), 215 Mass. 194, at 198, 102 N. E. 438.

³⁶ *White v. Ewing* (1894), 159 U. S. 36, at 40, 40 L. ed. 67.

³⁷ *Black v. Manhattan Trust Co.* (1914), 213 Fed. 692; *American Trust, etc., v. McGettigan, Rec.* (1899), 152 Ind. 582, 52 N. E. 793; *Albien v. Smith* (1909), 24 S. D. 203, 123 N. W. 672; *Atlantic Trust Co. v. Dana* (1903), 128 Fed. 209, at 218; *Cramer v. Iler* (1901), 63 Kan. 579, at 582, 66 Pac. 617.

Said the Supreme Court of New York state at late as 1911: "There is no general power of a court of equity to adjudicate the rights of persons not parties to the action or to displace or subordinate their liens or other property interests even upon notice. Ordinarily to accomplish such a result an action or proceeding must be brought against the parties affected and the issues therein tried and disposed of in the usual manner."³⁸

There are exceptions wherein the priority of mortgage liens can be displaced in favor of unsecured general creditors.³⁹

Lienholders of railway property and other public utilities are held to take their liens with the understanding that in case of receivership certain charges will be paid out of the income or proceeds of the property before the lienholders are paid. This same doctrine has been by a few courts extended to non-railway or non-public utility cases, but we think, without authority at law.⁴⁰

There are also cases wherein charges for running a receivership and other charges are paid out prior to payment to lienholders which can only be justified on the ground that the lienholder has consented to such payment either expressly or impliedly or else by his conduct or statements is held on the doctrine of estoppel to have consented.⁴¹

When a receiver is appointed over property mortgaged in a suit in which the mortgagee is not a party, such appointment does not divest the mortgage lien. The receiver holds the property subject to the mortgage,⁴² like property attached⁴³ or garnisheed.⁴⁴

Thus liens against property which goes into the hands of

³⁸ *Knickerbocker T. Co. v. O. C. & R. S. Ry. Co.* (1911), 201 N. Y. 379, at 384, 94 N. E. 871.

³⁹ *Old Colony Trust Co. v. Medfield & M. Ry. Co.* (1913), 215 Mass 156, at 162, 102 N. E. 484; citing *Kneeland v. American L. & T. Co.*, 136 U. S. 89, at 98, 34 L. ed. 379; *Thomas v. Western Car Co.*, 149 U. S. 95, at 111, 37 L. ed. 663; *Lackawanna I. & C. Co. v. Trust Co.*, 176 U. S. 298, at 316, 40 L. ed. 475.

⁴⁰ See ch. XXX.

⁴¹ See ch. XXX.

⁴² *Manufacturers & Mer. Co. v. Pyles* (1915), 125 Md. 317, 93 Atl. 917; *Pyles v. Manufacturers & Mer. Co.* (1915), 126 Md. 560, 95 Atl. 169.

⁴³ See ch. XX.

⁴⁴ *Rickman v. Rickman* (1914), 180 Mich. 224, 146 N. W. 609, at 617.

receivers are to be supported "in whatever may be the conditions of maturity of various obligations in which they are or may be interested."⁴⁵

While prior liens are not divested by the appointment of a receiver, and he takes the property subject to all existing liens, lien creditors can not enforce their claims and thus disturb his possession without the permission of the court.⁴⁶

A sale under execution after the appointment of a receiver without the consent of the court appointing the receiver, where the property was subsequently sold by the receiver under an order of court, was held void, and the purchaser at the execution sale acquired no title to the property.⁴⁷

§ 500. Liens by Attachment when Receiver Appointed.

Where a receiver was appointed for a corporation after its property had been attached in an action to which the plaintiffs in the attachment suit were not parties, such appointment of a receiver did not divest the attachment liens.⁴⁸

Liens by Attachment Sometimes by Statute Discharged when Receiver Appointed. Some states by statute compel attaching creditors to share in the distribution with others under the receivership which works a dissolution of the attachment.⁴⁹ It was held under this statute that the ancillary character of a receivership did not take the case out of the statute, and the statute applies to the appointment as ancillary receiver in Massachusetts of the same person who has been appointed receiver of the property of the debtor by a court of another

⁴⁵ Putnam, J., in *Brown v. Massachusetts Hide Co.* (1915), 218 Fed. 769.

⁴⁶ *Forest Lake Cemetery v. Baker* (1910), 113 Md. 529, 77 Atl. 853, appeal decision, 853; *Brown Co. v. Harris* (1909), 88 S. C. 558, 70 S. E. 802; *Lawson v. Warren* (1912), 34 Okla. 94, 124 Pac. 46.

⁴⁷ *Walling v. Miller*, 108 N. Y. 173, 15 N. E. 65; *Wiswall v. Sampson*, 14 How. 52, 14 L. ed. 322; *Forest Lake Cemetery v. Baker* (1910), 113 Md. 529, 77 Atl. 853.

⁴⁸ *Cowden v. Wild Goose M. & T. Co.* (1912), 189 Fed. 561, at 566; *Pease, Sheriff, v. Smith, Receiver*, (1896), 63 Ill. App. 411; *Kittridge v. Osgood*, 161 Mass. 384, 37 N. E. 369; *Merrill v. Commonwealth Ins. Co.*, 166 Mass. 238, 44 N. E. 144, which Massachusetts cases were decided before *Massachusetts R. L.*, ch. 167, secs. 126 and 127.

⁴⁹ *Massachusetts R. L.*, ch. 167, secs. 126 and 127, cited in *Second Nat. Bk. v. Tanning Co.* (1908), 198 Mass. 159, at 161, 84 N. E. 301.

state, and such ancillary appointment dissolves all attachments in Massachusetts.⁵⁰

§ 501. Liens by Garnishment when Receiver Appointed. Said the Michigan Supreme Court in 1914: "An injunction should not issue at the suit of a receiver to enjoin a creditor who has garnisheed funds of the corporation from proceeding with his suit. If claimant had obtained a valid lien on the fund, it was not dissolved by the filing of the bill and the appointment of a receiver, but may be enforced."⁵¹

§ 502. Mechanics' Liens Unaffected by Receivership. A mechanic's lien upon property is not released or displaced or ordinarily subordinated to other claims or liens in a suit in which the lienholder is not a party.⁵²

§ 503. Liens upon Discharge of Property from Receivership. "Unless protected by some general or special order made in discharging property from the custody of receivers, liens and other privileges may be lost. Also, while property remains under the control of the chancellor, unless relief is prayed for promptly, the progress of the estate may have so developed that an equitable estoppel will have arisen."⁵³

Said the Supreme Court of Indiana as follows: "When a court of equity has taken possession of property for administration for the benefit of creditors, and claimants thereto have come before the courts with their pretensions and had their priorities and equities judicially determined, and a sale is ordered to carry out the equitable conclusions, by the sale thus made the liens of all parties to the action are extinguished in the property and transferred to the fund arising therefrom. In the final distribution of this fund among creditors who have

⁵⁰ Second Nat. Bk. v. Tanning Co. (1908), 198 Mass. 159, 84 N. E. 301.

⁵¹ Rickman v. Rickman (1914), 180 Mich. 224, 146 N. W. 609.

⁵² Randall v. Wagner Glass Co. (1911), 47 Ind. App. 439, 94 N. E.

739; Totten v. Muncie Nail Co. (1897), 148 Ind. 372, 47 N. E. 703; Commonwealth R. Co. v. North Am. T. Co. (1905), 135 Fed. 984.

⁵³ Commonwealth Roofing Co. v. North Am. Trust Co. (1905), 135 Fed. 984, at 990.

come into the case at any stage of the proceeding, in respect of priorities, the court will be governed by established principles, keeping in view that the superior rights and equities of creditors are to be preserved in the fund to the same extent that they existed in the property sold.”⁵⁴

§ 504. Liens Fixed and Recorded after Receivership. Said a Texas court in 1908: “The appointment of a receiver can in no way interfere with the statutory proceedings necessary to fix and secure liens upon the property in his hands.”⁵⁶

A receiver can not encumber property after it has gone into the hands of a receiver, yet said the Supreme Court of Texas: “The lien is the creature of the law; the registration provided for preserves it. The record of a contract or filing of a mechanic’s lien does not newly encumber the property, but fixes and secures an existing lien.”

Liens fixed before the appointment of a receiver are generally not directly affected by the appointment. If possession of the property has not been taken by the receiver either actually or constructively, then liens may be acquired against that property after the appointment.⁵⁷

⁵⁴ *Mueller v. Stinesville, etc.* (1899), 154 Ind. 230, at 235, 56 N. E. 222. See *Totten v. Muncie Nail Co.* (1897), 148 Ind. 372, 47 N. E. 703.

⁵⁶ *United States & Mex. T. Co. v. Western Supply & Mfg. Co.* (1908) (Court of Civil Appeals of Texas), 109 S. W. 377, at 383; *Fragan v.*

Boyce, etc. (1886), 65 Texas 324, at 331; *Filer & Sotwell Co. v. Empire Co.* (1893), 91 Ga. 643, at 658, 18 S. E. 359; *Van Frank v. Brooks* (1902), 93 Mo. App. 412, at 426; *Richardson v. Hickman*, 32 Ark. 406; *Snow v. Winslow*, 54 Iowa 200, 6 N. W. 191.

⁵⁷ See sec. 466, *supra*.

CHAPTER XXI

CONTRACTS AND LEASES

ANALYSIS

CONTRACTS

- § 505. Executory Contracts Generally as Affected by Receivership.
- § 506. Executory Contracts Covering Property in Hands of Receivers.
- § 507. Executory Contracts Covering Personal Service by Defendant.
 - Executory Contracts Covering Service by Defendant Corporation.
- § 508. Executory Contracts Covering Personal Service to Defendant.
- § 509. Executory Contracts to Purchase Property.
- § 510. Executory Contracts of Corporations as Affected by Equitable Receivership.
- § 511. Executory Contracts as Affected by Dissolution of Corporation.
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 - (a) Cases Holding Dissolution Does Relieve Liability on Contract.
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- § 513. Executory Insurance Contracts when Corporation Dissolved.
- § 514. Executory Indemnity Bonds when Corporation Dissolved.
- § 515. Election of Receiver to Perform or Not to Perform Contract.
- § 516. When Appointment of Receiver Is Breach of Unexpired Contract.
 - New Jersey Rule.
- § 517. Specific Performance of Contract by Receiver.
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LEASES

- § 520. Chancery Receivership Does Not Cancel Leases.
- § 521. When Receiver Liable on Leases Existing.
- § 522. Attornment of Tenant to Receiver and Court.
- § 523. Existing Leases when Corporation Dissolved.
- § 524. Chancery Receiver Is Not Assignee of Lease.
- § 525. Power of Receiver to Make New Leases.
- § 526. Rights of Landlord against Receiver of His Tenant's Property.
- § 527. Repairs on Leased Premises.
- § 528. Liability for Rent of Premises Occupied by Receiver.

§ 505. Executory Contracts Generally as Affected by Receivership. When a receiver is ordered to take possession of the assets, books and papers, choses in action, etc., of an individual or a corporation, he frequently finds a number of uncompleted contracts. These may be contracts to deliver material, to render service, to rent or lease premises, etc., or they may be to accept material, accept certain services, pay rent for certain services, etc. The mere placing of the assets of an individual or a corporation in the hands of the court and having a receiver appointed does not of itself cancel contracts or engagements of the defendant, whether an individual or a corporation, although in certain cases it may prevent the individual or the corporation carrying out the contracts.

If the contract is for the defendant to perform services, the court can not be made to perform that service, neither can the receiver, because he is the court's officer and not the officer or agent or servant of the defendant who made the contract. If the contract provided for the defendant paying certain moneys or delivering certain materials, neither the court nor the receiver can be forced to deliver such material. Any suit for the same or the forcible taking of the same would be contempt of court. The receiver by accepting the trust is not responsible for the contracts and obligations of the defendant.¹

However, in a late English case the court refused to let the receiver disregard the former contracts and held as follows:

"It is the duty of the receiver and manager of the property and undertaking of a company to preserve the goodwill as well as the assets of the business, and it would be inconsistent with that duty for him to disregard contracts entered into by the company before his appointment.

"When, therefore, a receiver and manager of the undertaking and property of a colliery company had been appointed in a debenture holder's action against the company, the court declined to authorize him to repudiate the company's forward

¹ Commonwealth v. Fire Ins. Co. (1874), 115 Mass. 278; Ellis v. Railway (1871), 107 Mass. 1; Pea- body Coal Co. v. Nixon (1915), 226 Fed. 20.

contracts for the supply of coal, notwithstanding that since those contracts were made the price of coal had risen, and if the contracts were disregarded, a much larger sum would be obtained for the coal."²

Ordinarily, then, and with the exception just indicated in *In re Newdigate Colliery, Ltd.*, the court will not order the receiver to perform contracts which are not beneficial to the estate represented by the receiver.³

However, there are cases when the receiver may well perform the contract, and in doing so benefit the estate in the receiver's hands. The right to perform the contract and to have it performed existed in the defendant before the receiver was appointed; after the appointment, except in the case of personal services, or when the contract does not affect the property in the hands of the receiver, the defendant has no longer the power to perform it. If the contract is not therefore such a one as can only be performed by the defendant personally, there is no reason why the receiver should not perform it, provided the other party to the contract is willing or by law must accept such performances.

§ 506. Executory Contracts Covering Property in Hands of Receivers. It very often happens that a receiver is appointed over property, both real and personal, which the defendant by an executory contract has agreed to sell or otherwise dispose of or act concerning said property. The appointment of a receiver over such property places it in *custodia legis*; the defendant can no longer dispose of it, nor can the other party to the contract take it without permission of the court appointing a receiver. The receivership often and generally

² *In re Newdigate Col., Ltd.* (1912), 1 Ch. 468, C. D. 468. See cases cited. See American cases, *Peabody Coal Co. v. Nixon* (1915), 226 Fed. 20, and cases cited.

³ *Peabody Coal Co. v. Nixon* (1915), 226 Fed. 20; *O'Dell v. Bed-*

ford (1915), 224 Fed. 996; *Kansas City Southern Ry. Co. v. Lusk* (1915), 224 Fed. 704; *Butterworth v. Degnon Construction Co.* (1913), 208 Fed. 381; *Union Trust Co. of Indianapolis v. Curtis* (1914), 182 Ind. 61, 105 N. E. 562.

includes choses in action of the defendant which would include executory contracts.

It is the receiver's duty to ascertain what contracts are outstanding. He may find that by carrying out certain contracts as the defendant could have carried them out, that the trust committed to his charge would be benefited. Of course there are certain contracts which can or could be only performed by the individual defendant. The receiver is allowed a reasonable time to elect whether he will or will not carry out contracts of the defendant.^a A failure to elect before a reasonable time has elapsed can not be construed as a waiver of the receiver's right to take advantage of a contract.^b If the receiver is certain that it is to the advantage of the trust to carry out certain contracts, he should apply to the court for an order to do so, and, upon receiving such order, at once notify the other party or parties to the contract. The theory on which a receiver is allowed to carry out contracts is that the court takes possession of not only real and personal tangible property, but intangible property, such as choses in action, contracts, etc. If the receiver does not accept a contract, the other party to the contract can not have a claim against the receiver for his failure to carry it out, but the such party has in some cases a claim for damages against the individual or corporation for its failure to carry out the contract,^c and this claim may be properly presented to the receiver to be paid out of the funds in the hands of the receiver the same as any other claim of the same class against funds in the hands of the receiver.

^a *United States Trust Co. v. Wabash N. R. Co.* (1893), 150 U. S. 287, 37 L. ed. 1085; *Sparkaw v. Yerkes*, 142 U. S. 1, 35 L. ed. 915 (as to assignees in bankruptcy); *Sunflower Oil Co. v. Wilson*, 142 U. S. 313, 35 L. ed. 1025; *Crawford v. Gordon* (1915), 88 Wash. 553, at 561, 153 Pac. 363; *Rogers v. Union Iron & Foundry Co.* (1912), 167 Mo. App. 228, 150 S. W. 100.

^b *Du Pont v. Standard Arms Co.* (1912), 9 Del. Ch. 315, 82 Atl. 692;

Peabody Coal Co. v. Nixon (1915), 226 Fed. 20; *Kansas City Southern Ry. Co. v. Lusk* (1915), 224 Fed. 704; *O'Dell v. Bedford Co.* (1915), 224 Fed. 996; *Spencer v. Exposition*, 163 Ill. 117, 45 N. E. 250; *Nelson v. Kalkhoff*, 60 Minn. 305, 62 N. W. 335; *Commercial Publishing Co. v. Beckwith*, 167 N. Y. 329, 60 N. E. 642; *Howe v. Harding*, 76 Tex. 11, 13 S. W. 41.

^c *In re Wilshire Sern Co.* (1868), L. R. 3 Ch. App. Cas. 447.

§ 507. Executory Contracts Covering Personal Service by Defendant. The death of each party to a contract for a term of service is an implied condition of it which effects a legal termination of it, and therefore the death of either party does not give a right against the other for damages for such termination. But the taking of certain assets of an individual by the court into its possession does not necessarily prevent the individual performing his contract. His failure to carry out the contract would give the other party to the contract a claim against the individual first and secondarily against his assets, whether they be in the hands of a receiver or not. On the other hand, if the receiver takes possession of certain property of the individual, out of which exclusively the individual was to perform the contract, even then he may be held to respond in damages to the other party for not performing his contract.

His contract has not been carried out, and for the defendant's failure to carry it out the other party to the contract must have some recourse. The state can not make any law impairing the obligation of a contract. It must therefore be true that the party not in default in the contract must have a claim for damages against the property in the hands of the receiver.⁷

The receiver can not be made to specifically perform the contract which the defendant agreed to perform because a specific performance by the receiver would be a form of satisfaction or payment which the receiver can not be required to make. As well might he be decreed to satisfy the demand for specific performance by money as by the service sought to be enforced.⁸

§ 508. Executory Contracts Covering Personal Service to Defendant. When a receiver is appointed over the property of an individual or a corporation, the court takes possession

⁷ Union Trust Co. of Indianapolis v. Curtis (1914), 182 Ind. 61, 105 N. E. 562.

⁸ Ely v. Van Kannel Revolving Door Co. (1911), 184 Fed. 459. See

Spader v. Mural Decoration Mfg. Co., 47 N. J. Eq. 18, 20 Atl. 378; Rosenbaum v. Credit System Co., 61 N. J. L. 543, 40 Atl. 591.

of the property; it does not take possession of the individual or the corporation; it does not ipso facto render either unable to contract or fulfil his or its obligations. However, if the court takes all the property into its possession, neither the individual nor the corporation has anything to pay out for services rendered to it or to be rendered to it. The appointment of a receiver at the instance of an individual over the property of another individual or corporation will not excuse the performance of a contract, although it may deprive the contracting party of the means of performance, and such interference is not a prevention by operation of law.⁹

Thus if a defendant whose property is in the hands of a receiver fails to accept services under contract and pay for the services, he or the corporation may be liable for breach of the contract.¹⁰

Executory Contracts Covering Service by Defendant Corporation. A receiver is not bound by a contract made by a company before his appointment, which does not constitute a lien on the property, and the receiver can not be compelled to perform such a contract. The contract is that of the company, and for a breach of it the company, and not the receiver, is liable.¹¹

In case of the dissolution of a corporation there are different opinions as to whether the assets in the hands of the receiver can be made to respond for damages because the dissolved corporation fails to accept and pay for services. See sec. 511.

§ 509. Executory Contracts to Purchase Property. It frequently happens that the receiver of an individual's property or the property of a corporation finds executory contracts giving the individual or the corporation the right of completing a purchase and obtaining title. A receiver takes no greater

⁹ Express Co. v. Railroad (1878), 99 U. S. 191, 25 L. ed. 319. See Isaac McLean Sons Co. v. William S. Butler & Co. (1914), 227 Fed. 325, cases cited.

¹⁰ Klauber v. San Diego, etc., (1892), 95 Cal. 353, 30 Pac. 555.

¹¹ Reid v. The Explosive Co. (1887), 19 Q. B. D. 264.

title to or right in property than the individual or corporation had prior to the receivership.¹² A receiver, to obtain the property, may tender the purchase price as the individual or corporation and must be duly authorized by the court to do so.¹³

§ 510. Executory Contracts of Corporations as Affected by Equitable Receivership. When a nonstatutory chancery receiver is appointed over a corporation which is not dissolved, it is probable or at least possible that the assets will be returned to the corporation. In such a case the appointment of a receiver takes the assets and property out of the hands of the corporation and its officers, and, while the court has charge of the assets, the other party to the contract with the corporation, although he may be ready and willing to perform services concerning that property and assets, can not do so unless the court orders him to do so. The receivership may be lifted by the court appointing the receiver, or may be set aside by a higher court, and there may be an adjudication by one of the courts that the appointment of the receiver was not by the fault of the corporation or its officers.

The corporation lingers while the receiver and the court are in possession and control of its assets. When insolvency is declared, the corporation is incapacitated from doing new business. It has ceased as a going concern, but it still survives for the purpose of the discharge of the liabilities and the final distribution of the remaining assets when that has been accomplished.¹⁴

And yet the party to the contract of service has been deprived of his right to serve and to receive compensation. The corporation has not died or been dissolved by the sovereign power of the state. The party to the contract of service has been damaged and yet the corporation may not have gone

¹² *Continental T. Co. v. Brown* (1915) (Texas Civil Appeals), 179 S. W. 939; *McGill v. Brown* (1913), 72 Wash. 514, 130 Pac. 1142; *Black v. Manhattan Trust Co.* (1914), 113 Fed. 692.

¹³ *Continental T. Co. v. Brown* (1915) (Texas Civil Appeals), 179 S. W. 939.

¹⁴ *Chemical Bank v. Hartford*, etc. (1895), 161 U. S. 1, at 7, 40 L. ed. 595.

voluntarily in the hands of the receiver. The party injured has no claim against the court or the receiver as receiver when acting within the orders of the court. Has such a party a claim for damages for breach of the contract?

The corporation entered into the contract and the corporation breaks the contract.¹⁵

The right of an employee to prove damages against his employer for dismissal of the employee is by reason of the wrongful dismissal by reason of a breach of contract. If the dismissal is not wrongful, it is hard to see how any action lies. If the appointment of a receiver over a private business or a corporation amounts to the position of an employer who shuts up his business, that would amount to a wrongful dismissal, and would give the servants a right of action.¹⁶

§ 511. Executory Contracts as Affected by Dissolution of Corporation. When a corporation is dissolved and a receiver is appointed, the right and power of the corporation or its officers to continue business is suspended and ceases. The appointment of the receiver has the effect of laying of an equitable execution on all the assets of the corporation for all such creditors as may be found to have valid claim against it.¹⁷ When the court dissolves the corporation, it has no longer any power to perform its part of an existing executory contract.

Justice Story said in 1834: "A corporation, by the very terms and nature of its political existence, is subject to dissolution, by a surrender of its corporate franchises and by a forfeiture of them for wilful misuser and nonuser. Every creditor must be presumed to understand the nature and incidents of such a body politic and to contract with reference to them. And it would be a doctrine new in the law that the existence of a private contract of the corporation should force

¹⁵ *Union Trust Co. v. Curtis* (1914), 182 Ind. 61, 105 N. E. 562; *Isaac McLean Sons Co. v. William S. Butler & Co.* (1914), 227 Fed. 325, cases cited.

¹⁶ *Reid v. The Explosive Company,*

Ltd. (1887), L. R. 19, Q. B. D. 264; *Isaac McLean Sons Co. v. William S. Butler & Co.* (1914), 227 Fed. 325, cases cited.

¹⁷ *Du Pont v. Standard Arms Co.* (1912), Del. Ch. 315, 82 Atl. 692.

upon it a perpetuity of existence contrary to public policy and the nature and objects of its charter.”¹⁸

As far as contracts of personal service to the corporation, there are two lines of cases found in the books covering both sides of the proposition discussed in sec. 512, *infra*. As to claims for breach of contracts other than personal services, few decisions are found. Nevertheless it must be true that if a person has an ordinary open and executory contract with a company, and that company is dissolved or wound up, the company having broken its contract, the other party has a claim against the assets in the hands of the receiver for a breach of that contract.¹⁹

The claims of creditors against the defunct corporation differ from their claims against its assets in sequestration, for they are not proved against the insolvent and dissolved non-entity, but against the fund in the receiver's hands. In the distribution of that fund, the general rule applicable to insolvent estates, that equity is equity, should prevail so far as the statute, when reasonably construed, will permit.²⁰

§ 512. Executory Contracts of Personal Service when Corporation Dissolved. Does the dissolution of a corporation cancel all contracts and relieve the assets of the corporation from claims for damages for the breach of executory contracts for personal services?

Two lines of cases in America are to be found on the subject headed by *People v. Globe Mut. Life Ins. Co.*, 91 N. Y. 174, which, under the facts stated, holds that the contract for personal services is annulled by the action of the state, and no damages are collectible.

Whereas *Rosenbaum v. Credit System Co.*, 61 N. J. L. 543, under the facts therein stated, holds that the contract for

¹⁸ *Mumma v. Potamac Co.* (1834), 8 Pet. 287, 8 L. ed. 945. *Cas.* 447; *Chapman Case* (1866), L. R. 1 Eq. Cas. 346.

¹⁹ *In re Oriental Bank* (1886), 32 Ch. D. 366; *In re Willshire Iron Co.* (1868), L. R. 3 Ch. App. 200. ²⁰ *People v. American L. & T. Co.* (1912), 172 N. Y. 378, *u.*

personal services is not annulled and damages may be collected against the assets in the hands of receiver.

(a) Cases Holding Dissolution Does Relieve Liability on Contract. There is a line of cases headed by *People v. Globe Mutual Life Insurance Co.*²¹ which holds, "where performance of a contract by a corporation is prevented by its dissolution at the instance of the state or power creating it, the contract is automatically annulled and the corporation does not commit any breach of contract by not performing. That the appointment of a receiver under such circumstances has the same result as the death of a natural person employer."

A long list of decisions are found in various states following *People v. Globe Mutual Life Insurance Company*.²²

(b) Cases Holding Dissolution Does Not Relieve Liability on Contract. The Supreme Court of New Jersey²³ reiterates the trust-fund theory of capital stock. The state creates corporations and requires of them the possession of such a trust fund, and when it destroys their corporate existence, natural justice requires that it shall provide for distribution of the fund so that no part of it shall be returned to those who offer it as a security for the action of others until the latter shall have all the protection against loss in their undertaking that it is capable of affording.

In this New Jersey case the Commissioner of Banking took the initiative and secured the dissolution of the corporation; this was an act of the sovereignty which created the corporation and yet the court held that this was not equivalent to an act of God which would relieve the corporation from performance or damages for failure to perform.

In Ohio we have the case of *The Tiffin Glass Co. v. Stoehr*, 54 O. S. 157, wherein the stockholders voluntarily filed the

²¹ *People v. Globe Mutual Life Insurance Co.* (1883), 91 N. Y. 174.

²² *Du Pont v. Standard Arms Co.* (1912), 9 Del. Ch. 315, 82 Atl. 692; *Lenoir v. Linville Imp. Co.* (1900), 126 N. C. 922, 36 S. E. 185; *Eddy*

v. Co. of Ass. (1883), 3 N. Y. Civ. Proc. 442; *Loucheim v. Clawson* (1899), 12 Pa. Sup. Ct. 55; *Law v. Waldron* (1911), 230 Pa. St. 458.

²³ *Rosenbaum v. Credit System Co.* (1898), 61 N. J. L. 543.

requisite petition under the Ohio statute praying for a dissolution which was granted by the court. It must be noted that the plaintiff in this case was discharged several months before the corporation was dissolved and at the time of dissolution the claim existed. Under the facts stated the court allowed a claim for damages against the assets in the hands of the receiver. The court refuses to commit itself on what would have been its ruling had the corporation been dissolved by a proceeding by the state.

The English cases hold that dissolution or the winding up of a corporation does not relieve it from liability for breach of its contracts.²⁴ An order for winding up of a company is notice of discharge to the servants of the company.²⁵ The rule that an order for winding up a company operates as a notice of discharge to the servants when the business of the company is not continued after the date of the order, applies through the liquidator without continuing the business, employs the servants in analogous duties with a view to reconstruction.²⁶

(c) Measure of Damages when Corporation Dissolved. Where a contract of employment was cancelled by the appointment of a receiver, an English court²⁷ holding the dissolved corporation responsible calculated the damages to the dismissed employees as follows:

First. The present value of an annuity of the yearly wage for the unexpired term, regard being had to the risk to health and life.

Second. From the result something would have to be deducted for the employee being at liberty to obtain a fresh appointment.

²⁴ *Measures Bros. v. Measures* (1910), 1 Ch. 336; *General Bill Post. Co. v. Atchison* (1909), A. C. 118.

²⁵ *Yelland cases* (1867), L. R. 4

Eq. Cas. 350; *Chapman cases* (1866), L. R. 1 Eq. Cas. 346.

²⁶ *MacDowell's case* (1886), 32 Ch. D. 366.

²⁷ *Yelland case* (1867), L. R. 4 Eq. Cas. 350, at 351.

Third. Also the consideration of any other factors peculiar to that contract of employment under consideration by the court.

§ 513. Executory Insurance Contracts when Corporation Dissolved. When an insurance company goes into liquidation and goes into the hands of a receiver some very difficult questions come up as to what is a proper adjustment and settlement with the contract holders.

The corporation is dead for every purpose but it may have assets to distribute. Who are the creditors to receive those assets? Clearly those who were creditors at the time of the dissolution of the corporation.²⁸ But there may be claims not yet due and payable. What disposition shall be made of these?

The Supreme Court of the United States²⁹ commenting on a corporation which has gone into bankruptcy says: "By the act the company becomes mortuus, its business is brought to an absolute end, and the policyholders become creditors to an amount equal to the equitable value of their respective policies, and entitled to participate pro rata in its assets. The leading New York case³⁰ holds that only those who were creditors at the time of dissolution of the corporation were entitled to share in the assets and that a possibility of loss in the future would not be a claim on the assets. The distribution of the assets was an immediate duty on the part of the receiver, although the subsequent death of the policyholder did not entitle the plaintiff to recover an amount based on his death, but such policyholder's claim was fixed at the date of dissolution.

§ 514. Executory Indemnity Bonds when Corporation Dissolved. When a surety or similar company goes into the hands

²⁸ *People v. Commercial Alliance Ins. Co.* (1897), 154 N. Y. 95, at 100, 47 N. E. 968.

²⁹ *Carr v. Hamilton* (1888), 129 U. S. 252, at 256, 32 L. ed. 669.

³⁰ *People v. Commercial Alliance Ins. Co.* (1897), 154 N. Y. 95, at 100, 47 N. E. 968.

of a receiver and has assets for distribution, very difficult questions present themselves.

The New York courts³¹ follow the reasoning of the insurance cases, and hold that distribution must be theoretically made by a receiver the moment he is appointed, practically he defers distribution until he can make proper collections. This relay, however, does not change the rights of existing creditors nor bring in a new class who had no debts when if possible distribution would have been made. If one contingent claim is allowed all should be allowed and this might cause a delay of many years which would be unreasonable and unjust.

The New York court puts its ruling largely on the ground of expediency and admits that the rule may be harsh. In the New York case it must be noted that the corporation was insolvent, there was nothing to distribute among the stockholders and the contest was between creditors of the corporation, and furthermore that the court held that the contract itself was not impaired.

On the other hand a recent Iowa case³² discussing the question at length says at the time of dissolution, although it is true that the amount of a contingent liability could not be determined; nevertheless there was an obligation there arising out of a contract and such obligation existed until it was discharged in spite of the fact that the corporation was dissolved pro forma. And the corporation could not relieve itself from obligation by distributing its assets among the stockholders. It must be noted that in this case the stockholders tried to come in and cut out the creditor. If this ruling is carried out to its logical conclusion the receivership can never be finally wound up so long as there are assets and outstanding contingent claims. It may be said, however, that justice should not give way to expedience and convenience.

³¹ *People v. Metropolitan Surety Co.* (1912), 205 N. Y. 135, 98 N. E. 412; *Gay Mfg. Co. v. Gittings* (1892), 53 Fed. 45.

³² *Wisconsin & Ark. Lumber Co. v. Cable* (1913), 159 Iowa 81, 140 N. W. 211.

§ 515. Election of Receiver to Perform or Not to Perform Contract. It is the receiver's duty upon taking charge of a business in which are found subsisting contracts to notify the parties to those contracts that the business has been placed in the hands of a receiver. The receiver has a reasonable time to elect whether or not he will adopt any or all such subsisting contracts.^{32a} His election should be made as soon as possible and should be communicated in writing and a record made of it and it should be unequivocal. The contract, however, may be renounced by filing a suit to enjoin a party from paying out money under the contract³³ and in other ways. If the receiver performs and receives benefits therefrom there are obligations he also must assume.³⁴

It has been held by the Circuit Court of Appeals, Second Circuit, Coxe, C. J., writing the opinion, that where an equitable receiver of a transportation company on taking possession as receiver of the property, found a contract which might develop into an exceedingly valuable asset, he was in duty bound to proceed with the contract if it were beneficial to the estate administered by him and to abandon it if not beneficial. He had a reasonable time to investigate before deciding this problem. The receiver had the right to make the experiment of proceeding under the contract long enough to ascertain whether it was of any value to the creditors. While he was performing the service, he was entitled to be paid on a quantum meruit for the value of the material furnished.³⁵

For instance the general sales agent of a corporation sends in orders which are accepted by the company, but before they are filled, the company goes into the hands of a receiver. The Supreme Court of Pennsylvania has held that the receiver, if he does not adopt the general sales contract with the agent, may fill the orders on hand without being liable as receiver for the commissions of the agent under the contract. As to

^{32a} *Landon v. Public Utilities Com. of Kansas* (1917), 245 Fed. 950.

³³ *United Elec. L. Co. v. Louisiana Elec.* (1896), 71 Fed. 615.

³⁴ *Com. Pub. Co. v. Beckwith* (1901), 167 N. Y. 329, at 335, 60

N. E. 642; *Odell v. Bedford Co.* (1915), 224 Fed. 996, at 997.

³⁵ *Butterworth v. Degnon Contracting Co.* (1914), 214 Fed. 772, at 773; *Odell v. Bedford Co.* (1915), 224 Fed. 996, at 997.

such commissions the agent is in the same position as other creditors. In other words the indebtedness to the agent arising by virtue of the sales contract, was the company's debt at the date of the appointment of a receiver. When therefore the receiver taking charge, found in process of manufacture certain automobile bodies, etc., already sold to certain parties through the sales contract and the receiver furnished and delivered them, he created no new liability in favor or against anyone growing out of the sales-agency contract.³⁶

§ 516. When Appointment of Receiver Is Breach of Unexpired Contract. When does the appointment of a receiver amount to a breaking of an unexpired contract?

"The New York rule would seem to be that any legal termination of the business (especially under court order), which could have been reasonably in the minds of the contracting parties as a possible intervention of some vis major could not be relied upon as a breach of a contract in case it did occur." ³⁷

The New York rule is based on a case wherein the State of New York through its attorney general ³⁸ brought suit for dissolution under a New York statute.³⁹

What happened in that case was a dissolution of the contract by the sovereign power of the state rendering performance on either side impossible.⁴⁰

The New York doctrine has been applied to an ordinary equitable receiver by the courts of North Carolina,⁴¹ yet we do not think the doctrine laid down by the New York case is applicable to an ordinary equitable receivership. And the United States Federal Court ⁴² say: "It is not a light thing

³⁶ *Brandenburg, appellant, v. Cox* (1910), 228 Pa. 212, at 215, 77 Atl. 455.

³⁷ *Ely v. Van Kannel Rev. D. Co.* (1911), 184 Fed. 459, at 462.

³⁸ *People v. Globe Mutual Life Ins. Co.* (1883), 91 N. Y. 174.

³⁹ Laws of 1869, ch. 902, sec. 8.

⁴⁰ *People v. Globe Mutual Life Ins. Co.* (1883), 91 N. Y. 174, at 178.

⁴¹ *Lenoir v. Linville Imp. Co.* (1900), 126 N. C. 922, 36 S. E. 185, 51 L. R. A. 146.

⁴² *Pennsylvania Steel Co. v. New York, etc.* (1912), 198 Fed. 721, at 741.

for a chancery court, acting without statutory direction, to say that a creditor shall lose his demand when he has not been at fault and when the settlement of the estate will not be protracted by allowing it." And such claims have been allowed.⁴³

New Jersey Rule. The New Jersey courts have gone really farther than the United States federal courts and allowed a claimant to recover damages for a breach of contract caused by the receivership and dissolution of a corporation under statutory authority.⁴⁴

§ 517. Specific Performance of Contract by Receiver. A specific performance by a receiver would be a form of satisfaction or payment which he can not be required to make. As well might he be decreed to satisfy the appellant's demand by money, as by the service sought to be enforced.⁴⁵ Of course no court holding property through its receiver can be sued and forced to specifically perform a contract.⁴⁶

§ 518. Power of Receiver to Contract under Order of Court. A court may appoint a receiver not only to protect and preserve the physical properties as such, but keep them running as a going concern or business or as going concerns or businesses. In such a case it has been held that such a court has power to authorize the receiver or receivers to enter into such contracts as are usual and customary in such business, even though they may extend beyond the probable term of the receivership.⁴⁷ The appellate court in reviewing

⁴³ *Isaac McLean Sons Co. v. Butler* (1914), 227 Fed. 325. See *Commonwealth R. Co. v. North American T. Co.* (1905), 135 Fed. 984.

⁴⁴ *Spader v. Mural Dec. Mfg. Co.* (1890), 47 N. J. Eq. 18, 20 Atl. 378. Cited and approved, *Pennsylvania Steel Co. v. New York* (1912), 198 Fed. 721, at 740; *In re Dale L. R.*, 43 Ch. D. 255; *The Tiffin Glass Co.*

v. Stoehr (1896), 54 O. S. 157, 43 N. E. 279.

⁴⁵ *Express Co. v. Railroad* (1878), 99 U. S. 191, 25 L. ed. 319.

⁴⁶ *Albany City B. v. Schermerhorn* (1842), 9 Paige 375.

⁴⁷ *Gay, et al., v. Hudson River Electric Power Co., et al.* (1909), 173 Fed. 1003.

this holding said: "We think that a large discretion should be given to the receivers and the circuit court in the management of the property. It should be a very marked breach of discretion to justify our interference."⁴⁸

A receiver may contract as any other individual so long as he does nothing which interferes with the performance of his duties as receiver. When such a receiver contracts as an individual, he is liable as an individual. "The receiver being an officer of the court, and acting under the court's direction and instructions, his powers are derived from and defined by the court under which he acts. He is not such a general agent as to have any implied powers, and his authority to make expenditures and incur liabilities * * * must be either found in the order of his appointment, or be approved by the court, before they acquire validity, and have any binding force upon the trust."⁴⁹

All persons dealing with a receiver are chargeable with knowledge of the receiver's authority to act or contract.⁵⁰ Of course the receiver may misrepresent his authority and be guilty of deceit or otherwise guilty.

§ 519. Receiver Adopting Contract of Predecessor. Receivers coming into the possession of property purchased by illegally appointed receivers under a conditional sales contract which was voidable, are not entitled to retain the property and pay a reasonable value, but must repudiate the contract or pay the agreed price. The holders of the original contract have the right to the whole amount of sale price agreed to or the right to take back the article; they can not be made to accept a substitution of a contract and sell upon a quantum valebant. Courts can not make contracts.⁵¹

⁴⁸ Gay, et al., v. Hudson River Electric Power Co. (1910), 177 Fed. 1003 (memorandum decision).

⁴⁹ Chicago Vault Co. v. McNulta (1894), 153 U. S. 554, at 561, 38 L. ed. 819. See St. Joseph Gas Co. v. Barker (1916), 243 Fed. 206, at 215.

⁵⁰ Stone v. Trust Co. (1914), 183 Mo. App. 261, at 278; DeWolf v. Royal Trust Co., 173 Ill. 435, 50 N. E. 1049.

⁵¹ Crawford v. Gordon (1915), 88 Wash. 553, at 560, 153 Pac. 363.

LEASES

§ 520. Chancery Receivership Does Not Cancel Leases. The legal existence of a corporation is not cut short by the appointment of a chancery receiver. Even if it ceases to be a going concern, it still survives for the purposes of the discharge of its liabilities and the final distribution of its remaining assets. A national bank, for instance, remains liable during the remainder of the term for accrued and accruing rent under a lease of the premises occupied by it, although the receiver may have abandoned and surrendered them.⁵²

§ 521. When Receiver Liable on Leases Existing. In the case of certain statutory receivers when election is made, the receiver becomes vested with the title to the leasehold interest and a privity of estate is thereby created between the lessor and the receiver or assignee by which the latter becomes liable in the covenants running with the land.⁵³

In case of chancery receiver, liability is said to rest not on the theory of an equitable assignment to the receivers of the unexpired term, but on the fact of their adoption of an existing contract.⁵⁴

A receiver does not become liable upon the covenants of the lease because of his position as receiver, but because and only because of his own acts in respect thereto.⁵⁵ He becomes liable when he has elected to assume the lease or has taken possession of the demised premises and continued in possession under such circumstances as in law would be equivalent to such an election. He is allowed a reasonable time—a breathing

⁵² See *Penn Steel Co. v. New York City* (1912), 198 Fed. 721, at 728, 198 Fed. 728; *Chemical Nat. B. v. Hartford* (1895), 161 U. S. 1, 40 L. ed. 595, 16 Sup. Ct. Rep. 439.

⁵³ *United States Trust Co. v. Wabash* (1893), 150 U. S. 287, at 296, 37 L. ed. 1085. *Matter of Otis* (1886), 101 N. Y. 580, at 585, 5 N. E. 571.

⁵⁴ *Penn Steel Co. v. New York City Ry. Co.* (1912), 198 Fed. 721, at 728; *Turner v. Richardson*

(1806), 7 East 335; *Thomas v. Pemberton* (1816), 7 Taunt. 206; *In re Oak Its Colliery Co.* (1882), 21 Ch. D. 322; *In re Silkshire, etc.* (1881), 17 Ch. D. 158; *In re North York* (1878), 7 Ch. D. 661; *Ex parte Faxon* (1869), 1 Lowell 404; *Dietrich v. O'Brien* (1913), 122 Md. 482, 89 Atl. 717.

⁵⁵ *Sunflower Oil Co. v. Wilson* (1891), 142 U. S. 313, at 322, 35 L. ed. 1025; *Hoyt, et al., v. Stoddard* (1841), 2 Allen 442.

space so to speak—to investigate and determine the desirability of the adoption of the lease in the interest of the estate he represents and this even when he has taken possession under the lease.⁵⁶

The burden of proof is on the lessor seeking to recover rent from the lessee's receiver to show an election by the receiver to adopt the lease. What is a reasonable length of time for the election is a question to be determined from all the circumstances and facts of the particular case.⁵⁷

A receiver holding over beyond a term is not for that reason merely to be considered as a tenant from year to year. If he sees fit to adopt the lease he does so for the fixed and definite period. If he remains after the term it is held by the Supreme Court of Maryland that the law would not imply from the very character of his duties that he is creating a new tenancy from year to year. All the law would imply after the term is a tenancy at will.⁵⁸

§ 522. Attornment of Tenant to Receiver and Court.

The court of chancery certainly does not assume to itself any title or power of conveying, directing decrees only in personam and requiring the parties in whom the legal or equitable interest may be to convey for the benefit of those found to be beneficially interested.

The attornment to a receiver appointed by the court of chancery constitutes a tenancy by estoppel between the tenant and the receiver which the court applies to the purpose of collecting and securing the rents till the decree can be possessed.⁵⁹

§ 523. Existing Leases when Corporation Dissolved. When a corporation is dissolved and a receiver appointed it often

⁵⁶ Dietrich v. O'Brien (1913), 122 Md. 482, 89 Atl. 717; Empire Distilling Co. v. McNulta (1897), 77 Fed 700. See In re Mullings Clothing Co. (1916), 238 Fed. 58, at 65; Intercontinental Rubber Co. v. Bos-

⁵⁷ Fisher v. Columbia Nat. Bank (1913), 54 Ind. App. 558, 103 N. E. 119.

⁵⁸ Dietrich v. O'Brien (1914), 122 Md. 482, 87 Atl. 717. See Prince v. Schlesinger (1906), 116 N. Y.

happens that there are existing leases of which the corporation is a party which have been satisfied or cancelled. The corporation may be lessor or lessee. If the corporation is dissolved that of itself can not release the corporation from its obligation as lessor because a lessee has a vested right in the property leased. The property itself may pass into the hands of a third party or into the hands of a receiver and yet if it would be subject to the lessee's right before receivership, it would be after receivership. If a sale of the property is made under an order of court, the lessee's interest can not be cut off unless he has had his day in court.

If the dissolved corporation was a lessee and the lease has not expired, different questions present themselves. The assets of a corporation after its dissolution become a trust fund for the payment of the debts, and this includes debts to mature as well as accrued indebtedness, and all engagements entered into by the corporation which have not been fully satisfied or cancelled. Such engagements can not be cancelled without the consent of the party holding them, and receivers of dissolved corporations may be authorized to retain out of the assets a sufficient amount to cancel and discharge such open and subsisting engagements.⁶⁰

The position of the receiver in such a case is analogous to that of an executor.

If he waives the term he can not be charged as assignee of the lease, but if the landlord does not choose to re-enter, the estate of the testator may be liable for the rent in the due course of administration.⁶¹

The appointment of an ordinary chancery receiver could not automatically nullify a contract, because to do so would be a violation of the contract which is prohibited by the terms of the federal constitution.

After passing into the hands of a receiver by the controller of the currency under the provisions of the Revised Statutes

⁶⁰ *People v. National Trust Co.* (1880), 82 N. Y. 283, at 287. See *In re Mullings Clothing Co.* (1917), 238 Fed. 58, at 65.

⁶¹ *Martin v. Black* (1842), 9 Paige 641.

of the United States, a national bank remains liable, during the remainder of the term, for accruing rent under a lease of the premises occupied by it, although the receiver may have abandoned and surrendered them; but if the lessor, in the exercise of a power conferred by the lease, re-enters and relets the premises, the liability of the bank after the reletting is limited to the rent then accrued and unpaid, and the diminution, if any, in the rent for the remainder of the term after the reletting.⁶²

§ 524. Chancery Receiver Is Not Assignee of Lease. A chancery receiver takes no title to the leasehold estate which is vested in the defendant at the time of the appointment of a receiver. The receiver has mere possession of such leasehold estate as an officer of the court.⁶³ A receiver under such circumstances does not become the assignee of the term of the lease. He does not stand in the shoes of the lessee in every respect, and he is under no obligation to adopt his or its contracts.⁶⁴

§ 525. Power of Receiver to Make New Leases. A receiver may be authorized under order of court to lease the premises in his charge.⁶⁵ A lease beyond the customary term, according to the nature of the demised property which might extend beyond the termination of the litigation, would be an unjustifiable exercise of judicial discretion. It has even been held that a court has the power to authorize its receiver to enter into a lease for a term which might extend beyond the duration of the suit upon which the receivership is predicated.⁶⁶ It

⁶² *Chemical Nat. B. v. Hartford* (1895), 161 U. S. 1, 40 L. ed. 595.

⁶³ *Durand & Co. v. Howard Co.* (1914), 216 Fed. 585, at 591; *Stokes v. Hoffman House* (1901), 167 N. Y. 554, 60 N. E. 667.

⁶⁴ *Pennsylvania Steel Co. v. New York, etc.* (1912), 198 Fed. 721, at 728

⁶⁵ *Weeks, et al., v. Weeks, et al.* (1897), 106 N. Y. 626, 13 N. E. 36; *Daniels Ch. Pr.*, 14 Am. Ed. 749.

⁶⁶ *Shreve v. Hankinson* (1881), 34 N. J. Eq. 413, at 416; *Weeks v. Weeks* (1887), 106 N. Y. 626, at 631, 13 N. E. 96.

was held that a court, having authorized its receiver *ex parte* to enter into a lease, might modify the order, even if the rights of the lessee are affected thereby, and out of the funds in its hands might allow the lessee damages.⁶⁷

§ 526. Rights of Landlord against Receiver of His Tenant's Property. A trustee in bankruptcy is bound by all the forfeiture clauses in leasehold estates of the bankrupt.⁶⁸ A chancery court receiver can have no better rights to retain possession of a leasehold than a trustee in bankruptcy has. The landlord's right to enforce a forfeiture of the lease is not less when a chancery receiver is in possession than it is when a trustee in bankruptcy has possession.⁶⁹

§ 527. Repairs on Leased Premises. If receivers properly elect to accept a lease, then the lease is to continue and its covenants must be fulfilled. If the covenants of the lease are not fulfilled, there may be a cause for termination of the lease by the lessor in a proper proceeding against the receiver.⁷⁰

§ 528. Liability for Rent of Premises Occupied by Receiver. When in case of a railroad receiver operating a leasehold estate during the so-called trial period, that is until he properly elects to accept or adopt the lease, such receiver is not bound to pay rent during the trial period at the rate stipulated in the lease in case he elects to renounce the lease. In the absence of special equities the receiver does his full duty

⁶⁷ *Weeks v. Weeks* (1887), 106 N. Y. 626, at 634, 13 N. E. 96. See no damages awarded in *Kunbark v. Waldemar Co.* (1915), 169 App. Div. 239, 154 N. Y. S. 415.

⁶⁸ *Odell v. H. Batterman* (1915), 223 Fed. 292, at 296; *Lindeke v. Association Realty Co.*, 146 Fed. 630.

⁶⁹ *Odell v. H. Batterman* (1915),

223 Fed. 292, at 296. See when landlord was held to have recognized the lease in force and effect, *Durand & Co. v. Howard & Co.* (1914), 216 Fed. 585. See also *Coy v. Title G. & T. Co.* (1912), 198 Fed. 275.

⁷⁰ *Pennsylvania Steel Co. v. New York City Ry. Co.* (1908), 165 Fed. 477.

when he turns over to the lessor the entire net earnings of the road.⁷¹

The mere acceptance by the receiver of the trust does not render the receiver liable for the rent of the premises, and he can not be held liable under the lease until he elects to hold possession under the lease or does some act which is equivalent to such election.⁷²

⁷¹ *Pennsylvania Steel Co. v. New York City, etc.* (1912), 198 Fed. 721, at 733; citing *United States T. Co. v. Wabash Ry.*, 150 U. S. 287, 37 L. ed. 1085; *Mercantile T. Co. v. Farmers L., etc.*, 81 Fed. 254; *Park v. New York Ry.*, 57 Fed. 799; *New York, etc., Ry.*, 58

Fed. 268; *Central T. v. Wabash*, 34 Fed. 259; *Farrar v. Southwest R. Co.*, 116 Ga. 337, 42 S. E. 527.

⁷² *DeWolf v. Royal T. Co.* (1898), 173 Fed. 435, at 437; *Spencer v. Columbian Exposition* (1896), 163 Fed. 117, at 127.

CHAPTER XXII

POWERS AND DUTIES OF RECEIVER

ANALYSIS

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§ 561. Powers of Successive Receivers.

§ 562. Powers and Duties of Joint Receivers.

§ 563. Power of Receiver Appointed over Property Held in Trust by Third Parties.

§ 564. Power of Receiver over Property Pledged by Debtor.

§ 529. Discretion of Court in Managing Property. It has been held that a large discretion should be given to the receivers and the appointing court in the management of the property. It should be a very marked breach of discretion to justify an appellate court to interfere with such exercise.¹ Such appointing court may in its discretion say whether it will determine for itself all claims of or against the receiver or will allow them to be litigated elsewhere.²

It has been held that it is in the discretion of the court to order receivers to hold in their employ an employee whom they, according to the opinion of the court, wrongfully dismissed.³

Discretion of Receiver in Managing Property. Receivers are allowed to exercise a certain amount of discretionary power. This is necessary, particularly when they manage railroads or other large undertakings.⁴ However, in the exercise of their discretionary powers, they are not entitled to be careless, negligent, extravagant or guilty of other fault resulting in loss to their trust.⁵

¹ Gay, et al., v. Hudson River Electric Power Co. (1909), 173 Fed. Rep. 1003. Approved in Gay, et al., v. Hudson River Electric Power Co. (1910), 177 Fed. 1003.

² Durand & Co. v. Howard & Co. (1914), 216 Fed. 585, at 588, and cases cited.

³ Farmers Loan & Trust Company v. Central R. & Banking Company of Georgia (1895), 166 Fed. 333.

⁴ Coy v. Title Guarantee & T. Co. (1912), 198 Fed. 275, at 280.

⁵ Hitner v. Diamond State Steel Co. (1913), 207 Fed. 617, at 625.

§ 530. Powers and Duties of Receivers—Generally. First. Those powers and duties directly stated in the order of court⁶ appointing the receiver and such subsequent powers and duties as may from time to time be given.⁷

Second. Those powers and duties implied from the order or orders of court appointing the receiver and which are reasonably necessary to the carrying out of such order or orders.

Third. Such powers given to the receiver by provisions of federal or state statutes.

Fourth. Those powers which a long line of decisions and a uniform course of practice in the courts of chancery, both in this country and in England, have marked out as the jurisdiction asserted by the courts in respect to receivers and defined with some accuracy as their powers.

Fifth. A receiver appointed by the court may have certain statutory duties to perform, nevertheless, because he is an officer of the court which appointed him, he is at all times subject to the court's jurisdiction.

§ 531. Receiver Must Not Exceed His Powers. A receiver must not exceed the limits of the power and authority given him.⁸ In the progress and growth of equity jurisdiction, it has become usual to clothe such officers with much larger powers than were formerly conferred.⁹ While in theory he can do nothing without the court's order or sanction, he has, in matters of management and manner of disposition of the estate, a large discretion.¹⁰ This is especially true when the court appoints a receiver to carry on a business, for the court

⁶ *T. L. Smith Co. v. Orr* (1915), 224 Fed. 71, at 73; *Young v. Stevenson* (1899), 180 Ill. 608, 54 N. E. 562; *State v. Shephard*, Rec. (1889), 120 Ind. 197, 21 N. E. 1093; *Decker Bros. v. Berners Bay M. & M. Co.* (1905), 2 Alaska 504.

⁷ *State Central Saving B. v. Ball B. Chain Co.* (1902), 118 Iowa 698, 92 N. W. 712.

⁸ *Face v. Hall* (1914), 183 Mich.

22, 148 N. W. 777; *Chicago Deposit Vault Co. v. McNulta*, 153 U. S. 554, 38 L. ed. 819; *Terry v. Martin*, 7 N. Mex. 54, 32 Pac. 157, 7 N. W. 54; *Stone v. Trust Co.* (1914), 183 Mo. App. 261, at 278, 166 S. W. 1091.

⁹ *Davis v. Gray* (1872), 16 Wall. 203, 21 L. ed. 447.

¹⁰ *Coy v. Title Guarantee & Trust Co.* (1912), 198 Fed. 275.

necessarily commits to his discretion the management of all the administrative details relating thereto.¹¹

This is necessarily true in the case of a large railroad placed in the hands of a receiver.¹²

Receiver's Duty to Ask for Instructions. Receivers have a very large latitude in the matter of asking advice and seeking the protection of the court appointing them with reference to the discharge of their duties.¹³ They are at all times entitled to apply to the court for instructions.¹⁴

§ 532. No Delegation of Authority by Receiver. The court and under the practice and statutes of most states must appoint the receiver and should know that his qualifications enable him to perform the duties of the office. The personal element, of course, offers abundant reason why the receiver's powers should not be delegated.

A receiver can not appoint a deputy without special order of court.¹⁵ A receiver can not abdicate or limit his powers or thus tie himself up in the performance of his official duties by contract with some other person.¹⁶

A receiver may, however, either by direct authority or under implied authority, occupy the position and have the rights of an employer, although the man operating under him may be in a certain sense an employee of the court.¹⁷

¹¹ *Chicago Deposit Vault Co. v. McNulta* (1893), 153 U. S. 554, at 561, 38 L. ed. 819, 14 S. C. Rep. 915; *Gay, et al., v. Hudson River Electric Power Co.* (1910), 177 Fed. 1003; *Continental Trust Co. v. New York & T.* (1894), 59 Fed. 514.

¹² *In re Seattle L. S. & E. Ry. Co.* (1894), 61 Fed. 541.

¹³ *Bull v. International Power Co.* (1916), 98 Atl. 382, 86 N. J. Eq. 275; *Cammack v. Johnson*, 2 N. J. Eq. 163.

¹⁴ *Harvey v. Gartner* (1915), 136 La. 411, 67 So. 197; *Davis v. Gray*

(1872), 16 Wall. 203, at 217, 21 L. ed. 447; *Corey v. Long* (1872), 12 Abb. Prac. Rep. (N.S.) 427.

¹⁵ *Herring v. Railway* (1887), 105 N. Y. 343, 12 N. E. 763; *Murray v. Cantor* (1894), 41 N. Y. Supp. 652.

¹⁶ *Brousard v. Mason* (1914), 187 Mo. App. 281, at 293, 173 S. W. 698; *Shadewald v. White* (1898), 74 Minn. 208, 77 N. W. 42; *Buchanan v. Hicks* (1911), 98 Ark. 364, 136 S. W. 177.

¹⁷ *In re Seattle, etc., Ry.* (1894), 61 Fed. 541.

§ 533. Status of Employees of Receiver. A chancery court takes the possession of property for its preservation. Since it is not practical for the court to do the physical work in connection with taking the possession and preserving the property, the court appoints its officer or receiver to act. When the property is extensive or the receivership involves running a business or railroad or other public utility, or when other circumstances obtain, it is often practically impossible for the receiver to perform the work for the court without the aid of assistants. Ordinarily the receiver can not employ assistance and so relegate his powers, but should get an order of court to employ others. In a receivership as referred to above, where it is absolutely necessary to employ others, the power to employ will ordinarily be implied,¹⁸ but the court should scrutinize very carefully every disbursement of the receiver and to properly protect the receiver and the fund. This power to employ should be very carefully stated in the order appointing him or in a subsequent order.

It has been held that it is in the discretion of the court to order receivers to hold in their employ an employee whom they, according to the opinion of the court, wrongfully dismissed.¹⁹

§ 534. Receiver's Liability for Loss by Employees. For a full discussion of this subject, see under ch. XXIX, "Liabilities of Receiver."

§ 535. Employment of Counsel by Receiver. Although a receiver is an officer of the court and subject to its directions and orders, and entitled at all times to apply to the court for instruction and advice, he is also permitted to obtain counsel for himself.²⁰ The court will give instructions if the matter

¹⁸ Taylor v. Sweet (1879), 40 Mich. 736, at 739.

¹⁹ Farmers Loan & Trust Co. v.

Central R. & B. Co. of Georgia (1895), 166 Fed. 333.

²⁰ Stuart v. Boulware (1889), 133 U. S. 78, at 81, 33 L. ed. 568.

is properly brought before it, but even in such case it is ordinarily necessary to have a lawyer present the matter to the court, to adequately investigate the law and present authorities. If conflicting rights arise, it is also necessary to have the other side properly in court and properly represented by counsel.

§ 536. Selection of Counsel by Receiver. The rule has been heretofore laid down that no one will be ordinarily appointed receiver whose interests would substantially conflict with his unbiased judgment and duties as receiver. The same rule holds good in selecting a counsel or counsellors for the receiver. A receiver will not be permitted to employ as his counsel one whose interests in person or as attorney for another are hostile to the interests represented by and the duties of such receiver. Where an attorney was seeking to act for both sides with such hostile interests, his conduct was held to be fraudulent and no fees allowed him.²¹

A receiver usually selects his own counsel,²² but he can not make any contract of hiring or agreement for compensation that is binding on the court.²³

Said the Supreme Court of Louisiana: "It has never been the practice in this state in insolvency proceedings, or proceedings under receivership for the receiver to ask leave of the court to employ an attorney or to give its sanction to the employment of any particular person. The right to obtain the services of counsel and to select the counsel has always been recognized as matters of right. Should there be objection on the part of creditors for legal reasons, those objections should be made at once on the grounds stated. The fact that the attorney selected or those who employ him may have personal interests in the administration is not good ground for his exclusion by the receiver from employing him as his counsel.

²¹ Farwell v. Great Western Tel. Co. (1896), 161 Ill. 522, at 614, 44 N. E. 891.

²² Villere v. New Orleans Pure Milk Co. (1909), 122 La. 717.

²³ Hickey, et al., v. Parrot S. & C. Co. (1905), 32 Mont. 143, at 154, 79 Pac. 608.

The fact, however, affects the amount of fee. To the extent that his services inured to the benefit of the mass of creditors, they should be paid.''²⁴

It has been held that there is no impropriety in the employment by a receiver of the same attorney employed by the creditors unless there is a conflict of interests, in which case the remedy is by employment by the receiver of another attorney.²⁵

§ 537. Power of Receiver to Employ Auctioneer. A receiver under proper circumstances may employ an auctioneer to sell the property, and a stockholder or officer of a corporation may under proper circumstances be legally appointed auctioneer to make the sale of the property of the corporation in the hands of the receiver.²⁶ If such a party makes the sale he should be as much entitled to commission as any other person who might perform the duties and the amount of compensation for his services should stand on the same footing as that of any third person making the sale.²⁷

§ 538. Power of Receiver to Employ Accountant. It is ordinarily the receiver who is charged with the duty of administering or settling the affairs of the defendant whose property is placed in the hands of the court through its receiver. Frequently the receiver may be authorized to employ an expert accountant or other suitable person to assist the receiver. In such a case such a person is the employee of the receiver. If the employee goes beyond the scope and employment of the receiver and in opposition to the explicit direc-

²⁴ *Villere v. New Orleans Pure Milk Co.* (1909), 122 La. 717, at 743, 48 So. 162.

²⁵ *Daniel v. Citizens Ins. Co.* (1907), 149 Mich. 626, 113 N. W. 17; *McPherson v. United States* (1917), 245 Fed. 35, at 41.

²⁶ *Dupuy v. Delaware Ins. Co.*, 63

Fed. 680; *Fridericks v. Fridericks, Young & Taney* (1910), 126 La. 689, at 704, 52 So. 996.

²⁷ *Fridericks v. Fridericks, Young & Taney* (1910), 126 La. 689, at 704, 52 So. 996; *Villere v. New Orleans Pure Milk Co.* (1909), 122 La. 717, at 743, 48 So. 162.

tions of the receiver, he is not strictly entitled to recover for such excess work.²⁸

§ 539. Receiver's Duty to Take Possession. One of the main purposes of a receiver is the physical protection of the property intrusted to such receiver's care. In order to effect this protection, he must take possession of the property. The order appointing a receiver should contain a direction to the defendant to deliver over to the receiver, his property covered by the receivership proceedings.

The old practice was for the receiver or the party who wished an actual delivery of the property in addition to the legal assignment thereof to call upon the master to decide on the evidence before him, what property legally or equitably belonged to the defendant and to which the receiver was entitled under the order of court, was in the possession of the defendant or under his power and control. And it was the duty of the master to direct the defendant to deliver over to the receiver the actual possession of all such property in such manner and within such time as the master may think reasonable.²⁹

§ 540. Duty of All Persons to Deliver Possession to Receiver. If an order is made by a court that a receiver take into his possession certain goods or money³⁰ or other property, it is the duty of the receiver to demand the same from the party holding them. If this party does not hand them over, he is in contempt of court even though he has not been officially appraised of the order provided he has actual knowledge.³¹

Where a bank or other party located in one county refuses to pay over money to a receiver appointed in another county and the bank or other party has never been brought within

²⁸ *Grabee v. Moffit* (1907), 133 Iowa 54, 110 N. W. 142.

²⁹ *Parker v. Browning* (1840), 8 Paige 388.

³⁰ *Bowker v. Haight & Freese Co.* (1906), 146 Fed. 257.

³¹ *Lewis v. Singleton, etc.* (1878), 61 Ga. 164; *Drakeford v. Adams* (1894), 98 Ga. 722, 25 S. E. 833.

the court's jurisdiction by proper process or otherwise, an order made upon such bank or other party is void for want of jurisdiction. Yet such bank or other party is not to be permitted to retain the moneys or other property due the receiver. The proper proceeding is for the court to order its receiver to make demand and upon failure of the bank to pay to order the receiver to forthwith institute suits to recover the deposits or other property.³²

§ 541. Collection of Assets by Receiver. It is the duty of the receiver to take possession of the property covered by the order of appointment.³³ If the person who has possession refuses to deliver up, if he is a party to the bill, he may be proceeded against for contempt. If he is not a party, he may be made one for that purpose provided he is in the local jurisdiction of the court or provided he is within the state or sovereignty of the appointing court and the court has power to send its officer and process to where the party is located or has power to send its process into another county and district and have the sheriff or other proper officer serve that process. The receiver may also, by leave of court, proceed to recover possession by a suit at law.³⁴

It is not necessary in any case for the receiver to put himself in a situation where he is not entitled to the full protection of the court; as he is under no obligation to attempt to take property out of the possession of a third person, or even out of the possession of the defendant himself, by force and without an express order of the court directing him to do so.³⁵

§ 542. Protection of Receiver when Seizing Property. The order appointing a receiver should describe carefully all the

³² Tenth Nat. Bk. v. Construction Co. (1910), 227 Pa. 354, 76 Atl. 67. (1840), 8 Paige 388; Wynne v. Newborough (1789), 3 Bro. Ch. 88;

³³ Southwestern Surety Ins. Co. v. Pacific C. C. Co. (1916), 92 Wash. 654, 159 Pac. 788. Green v. Winter (1814), 1 Johns. Ch. 60.

³⁴ Morrill v. Noyes (1863), 56 Me. 463; Parker v. Browning (1840), 8 Paige 273.

³⁵ Parker v. Browning (1840), 8 Paige 386; Cassilear v. Simms (1840), 8 Paige 273.

property which the receiver is ordered to take into his possession. The receiver has no discretion as far as selecting the property to be taken. If the court making the order had jurisdiction in the case before it and the order was valid, then in carrying out the order the receiver is protected not only in the court which issued the order, but in all other courts.³⁶ However, where the property is in the possession of a third person under a claim of title, the court will not protect the officer who attempts, by violence, to obtain possession any further than the law will protect him, his right to take possession of property of which he has been appointed receiver being unquestioned.³⁷

Receivers have a right in the receivership action and in the court which appointed the receiver by a restraining order or injunction to prevent irreparable injury to their property by anyone who upon the record has not a right to inflict that injury. They have the right to prevent an act by anyone which will interfere with the possession or value of the property that they are administering as receivers, where the record of rights of the party causing the injury show on their face that they have not a legal right to do what they are attempting to do.³⁸ Application for such restraining order or injunction may be made by the plaintiff in the case as well as the receiver.³⁹

If when a receiver is appointed it is found that property alleged to belong to the defendant or defendant corporation is in the possession of third persons who claim adverse title, and who have not been made parties to the action, the receiver can not interfere with their possession. They are entitled to their day in court, and the receiver must proceed by suit in the ordinary way to try his right to the property, or the plaintiff must bring them in as parties to the action and apply

³⁶ See analogous matter discussed in *Buck v. Colbath* (1865), 70 U. S. 334, 18 L. ed. 257.

³⁷ *Parker v. Browning* (1840), 8 Paige 388, at 391.

³⁸ *Brady v. South Shore Trac. Co.* (1912), 197 Fed. 672.

³⁹ *Wheaton v. Daily Tel. Co.* (1903), 124 Fed. 61, at 62.

to have the receivership extended to the property in their hands.⁴⁰

§ 543. Receiver's Duty to Make Inventory and Appraisement. The statutes of most states are silent as to the filing of an inventory and appraisement in receivership cases. However, the receiver is responsible to the court for the property which comes into his hands, the property is primarily in the custody of the court, therefore the court is entitled to full knowledge concerning it, and can call for a report at any time. All books, documents and papers in the hands of a receiver are quasi-public in character and are open to examination, not only by the court, but by persons interested in the estate.⁴¹

In order to make a report the receiver must know what he has, therefore for his own protection and in order to answer any questions concerning the property and to guard against dissipation of the property, the receiver should within a reasonable time after his appointment and as soon as possible, cause an inventory and appraisement to be made and file a schedule of liabilities. Analogous proceedings in administration of estates of decedents and of bankrupts, generally demand three disinterested appraisers and the court appointing receivers, should be asked to appoint them. If real estate is to be appraised, the three appraisers should be freeholders in order that the appraisement may follow the usual statute of selling land under execution, although there may be no statute requiring an appraisement at all of property in receiver's hands. Such an appraisement may be the basis for selling the land by the receiver later if the same should become necessary.

⁴⁰ Havemeyer v. Superior Court (1890), 84 Cal. 327, 24 Pac. 121; Wheaton v. Daily Tel. Co. (1903), 124 Fed. 61, at 62. See State v. McClure (1913), 133 Paige 1063.

⁴¹ In re Receivership New Iberia Cotton Mill Co. (1903), 109 La. 875, 33 So. 903; Decker Bros. v. Bernas Bay M. & M. Co., 2 Ala. 504.

Although an inventory of the property should be made by a receiver wherever possible, the failure to make the same will not of itself invalidate a sale of the property uninventoried.⁴²

§ 544. Receiver's Duty to Keep Accurate Accounts. It is a receiver's duty to keep accounts of receipts and expenditures in the shape of books and vouchers in such a manner as to furnish an intelligible and perspicuous account of his acts and transactions in order that the bondholders, lien creditors and all creditors as well as the court may at any time as occasion requires, ascertain the true condition of affairs.⁴³ A provision should be placed in the order of appointment somewhat as follows:

"That said receivers are hereby directed and required to keep proper books of accounts wherein shall be stated the earnings, expenses, receipts and disbursements of the said trust under this order of their appointment and preserve vouchers for all payments made on account by them thereon."⁴⁴

The statutes of Louisiana expressly require that, "receivers shall, when vested with powers of administration, file quarterly statements of their gestion unless oftener required, showing accurately the condition of the business conducted by them, etc."⁴⁵ The purpose of the statement is to show accurately the condition of the business at the end of every three months for the information of the court and the parties in interest.⁴⁶ Even if statutes do not expressly demand such an accounting, the court should require a monthly statement or at such other times as the circumstances and the security of the parties in interest require it.

⁴² French v. McCready (1900), 57 S. W. 894.

⁴³ Hitner v. Diamond State Steel Co. (1913), 207 Fed. 616, at 622.

⁴⁴ See Hitner v. Diamond State Steel Co. (1913), 207 Fed. 616, at 622; Standish v. Musgrove (1906), 223 Ill. 500, at 505, 79 N. E. 92;

Beardsworth v. Whitehead (1910), 122 N. Y. S. 31.

⁴⁵ Section 9, p. 315, of Act No. 158 of 1898, Laws of Louisiana.

⁴⁶ In re Receivership of Dugdamonia Shingle and Lumber Co. (1907), 118 La. 242, at 246, 42 So. 789.

Receiver's Duty to Preserve Vouchers. It is the receiver's duty to keep an accurate account of all money received and expended. Even in the absence of objections by an interested party, a court should closely scrutinize the accounts of a receiver before approving them.⁴⁷ The correctness of the expenditures should be made to appear from something more than the statement made in the report itself.⁴⁸ Vouchers should be demanded when any payments except petty payments are made and these vouchers preserved and filed with the receiver's report.

§ 545. Custody and Care of Property by Receiver. The object of the appointment of a receiver is to preserve⁴⁹ the property and at times to realize the property and administer it for those rightfully entitled to the property. The effect of the appointment is to remove the parties to the action from the possession of the property. Receivers and managers are custodians of the property. The relation of the receiver to the owner is the relation of caretaker and owner.⁵⁰

It is the court's duty to see that the property is conserved with the same care as is exacted from trustees generally, and the receiver should use due diligence in keeping down expenses and shielding the property from unjust exactions. No other rule would be consistent with the high responsibility involved when the court divests owners of property of their possession for the purpose of a safer administration and a more just distribution by the court.⁵¹

(a) Leasing of Property by Receiver. It was early decided by Lord Chancellor Thurlow, that, "a receiver is to let the estate to the best advantage."⁵² However, "he can not set

⁴⁷ *Standish v. Musgrove* (1906), 223 Ill. 500, at 505, 79 N. E. 92.

⁴⁸ *Standish v. Musgrove* (1906), 223 Ill. 500, at 506, 79 N. E. 92.

⁴⁹ *Metropolitan Trust Co. v. North Carolina L. Co.* (1908), 162 Fed. 170, at 179; *Atlantic Trust Co. v. Dana* (1903), 128 Fed. 209, at 218.

⁵⁰ *Paterson v. Gas Light & C. Co.* (1896), 2 Ch. 476.

⁵¹ *State Central Savings Bk. v. Ball Bearing Co.* (1902), 118 Ia. 698, at 704, 92 N. W. 712.

⁵² *Wynne v. Lord Newborough* (1790), 1 Ves. Jr. 164.

and let, or make expenditures upon the estate without an application to the court." He should, however, be careful not to make such long leases as would prevent or prejudice a sale of the property or other disposition by the court when the court should so order. And if property is leased for a long or fixed term, clauses should be inserted reserving to the court the power to cancel them whenever it is deemed expedient to do so.⁵³

Courts may not only lease property in its hands under a receiver, but have power to lease a railroad already built, not for the sake of entering into a new and independent enterprise, but simply for the sake of more successfully carrying on the receivership which it is undertaking.⁵⁴

A Virginia court in discussing the power of the court to authorize its receiver to take a lease of another road, where it is manifestly for the interest of the creditor and of the company, said: "A court of equity having in charge the mortgaged property of a railroad company, is authorized to do all acts that may be necessary within its corporate power to preserve the property and to give it additional value, not only for the benefit of all the lien creditors, but also for the benefit of the company whose possession the court has displaced by the appointment of a receiver, and by taking into its own hands the property, rights, works and purchases of the company. Any act, it would seem, necessary for the protection and preservation of the property, is a legitimate and proper act, and whatever is manifestly appropriate to such preservation and protection, or to the enhancement of the value of the property, not in excess of the powers of the corporation will always be upheld and enforced by the courts. *Jerome v. McCarter*, 4 Otto U. S. R. 734; *Wallace v. Loomis*, 7 Otto U. S. R. 146, 162." ⁵⁵

⁵³ *Farmers Loan & T. Co. v. Eaton* (1902), 114 Fed. 14, at 17.

⁵⁴ *Brewer, J., in Mercantile, etc., v. Railway* (1889), 41 Fed. 8.

⁵⁵ *Gilbert v. W. C. etc., Ry.*

(1880), 33 Gratt. 586. See contrary under special states, *State of Tennessee v. Railway* (1880), 6 Lea 353; *McMinoville, etc., Ry. v. Hugins, etc.* (1873), 3 Baxt. 177.

(b) Watching Property. Receivers should take the same care of the assets that a prudent man takes of his own property, that is ordinarily enough. Receivers are not required in most cases to employ a custodian. If a receiver appoints a custodian not reasonably necessary, the expense will be charged to the receiver personally.⁵⁶

(c) Insurance of Property. In many cases when receivers are appointed there is an insurance already on foot and then he takes over the policy, pays the premiums and is allowed them on passing his accounts. "It appears to me that it is consistent with his duty as receiver and that the court has itself sanctioned it that he should make and keep this insurance on foot."⁵⁷

For further cases on the subject of insuring property by receivers, see ch. XXIX, "Liabilities of Receivers."

(d) Repairs and Improvements on Property. Said Chitty, J.: "Repairs of real estate fall within the scope of the receiver's duty; he is allowed to do certain repairs without even coming to the court. In fact he may at his own risk execute repairs of a more extensive kind. There is no exact rule that I know of as to the amount that he may do upon his own responsibility, but of course what he does upon his own responsibility is liable to be questioned unless he has obtained the previous sanction."⁵⁸

The object of the appointment of a receiver is to preserve the property physically. To do this it must be protected from theft and from fire and water and other elements. In cases it is absolutely necessary to repair property. It is a receiver's duty to do this and he ought to ordinarily secure an order from court giving him such authority. But even without an order if the receiver can show that the repairs were absolutely

⁵⁶ *In re Tisch* (1912), 202 Fed. 1018.

⁵⁷ *Sullivan, et al., v. Miller* (1887), 106 N. Y. 635, at 643, 13 N. E. 772. See *In re Graham* (1895), 1 Ch. D. 71; *Thompson v.*

Phoenix Ins. Co., 136 U. S. 287, 34 L. ed. 408, 10 S. C. Rep. 1010; cited in *Tinsley v. Etowah Power Co.* (1912), 197 Fed. 602, at 609.

⁵⁸ *In re Graham* (1895), 1 Ch. D. 66, at 72.

necessary and the cost reasonable, the expenditure will ordinarily be allowed.⁵⁹

(e) **Involving Estate in Expense.** It is improper for the receiver to do any acts which might involve the estate in expenses without first applying to the court. Receiver should not even defend a suit without such sanction.⁶⁰

A receiver appointed to get in property, part of which he finds in the possession of another receiver, ought not to take proceedings to deprive the latter of such possession without the authority of the court.⁶¹

§ 546. Power of Receiver to Deposit Funds in Bank. Very few receivers have, themselves, the necessary facilities for properly guarding large sums of money. A prudent business man would place his idle funds on deposit in a safe bank and a receiver should do the same. The court is really the custodian of the funds, the receiver is just the arm of the court to obey the court's orders. He should get an order from court ordering him to place the funds in a designated bank. Since, however, it would be more dangerous to the funds for the receiver to keep them than to properly deposit them, it must be held that he can and should deposit such funds even without a court order in a bank of good standing and repute, such a one as a reasonably cautious and prudent man would use in transacting his own business of like importance and the same rule would hold as to continuing the deposit.⁶²

Under such circumstances it would seem that there is an implied power in the receiver's appointment order to so deposit the funds and therefore that the receiver could not be held personally liable if they were lost by the bank.

⁵⁹ Sullivan, et al., v. Miller (1887), 106 N. Y. 635, at 643, 13 N. E. 772; Atwood v. Knowlson (1900), 91 Ill. App. 265, at 268. See Standish v. Musgrove (1906), 223 Ill. 500, at 506, 79 N. E. 161.

⁶⁰ Swaly v. Dickon (1833), 5 Sim.

631; Brislowe v. Needham (1847), 2 Phil. 190.

⁶¹ Ward v. Swift (1848), 6 Hare 309.

⁶² State v. Corning State Savings Bank (1905), 128 Ia. 597, at 598, 105 N. W. 159.

§ 547. Power of Receiver to Invest Funds. Since the purpose of a receiver is to preserve a fund, cases may arise where because of the length of time such funds remain in the hands of the receiver, that a proper investment of the funds is expedient. Since the preservation of the fund is the main purpose of the receivership, the law must guard those funds with great jealousy. The court is the real guardian of the fund and has power over it.⁶³ Since the court can direct the funds to be deposited in a bank or otherwise, there seems no valid reason why the court should not direct the investment of the funds under proper safeguards.

The receiver has no power and no discretion beyond what is contained expressly or by implication in the orders of the court. He is personally liable for every loss which may happen by reason of his acting without or beyond them.

Public safety and the safety of the funds held by officers of courts for the use of suitors under the orders of the courts, require a different and stricter rule of responsibility to be applied to them than to administrators, guardians and trustees of like character. These last are compelled to act upon their own judgment. But an officer of the court may generally consult the parties in interest as to any change in the disposition of the fund and he may always ask the advice of the court and that if given without fraud on his part, will be a protection.⁶⁴

§ 548. Interest on Funds Invested by Receiver. No trustee is allowed to make a profit off the trust he handles, although under proper circumstances the court will allow him compensation for handling the trust. Any interest on the trust funds belongs to the trust estate and does not belong to the trustee. The same rule prevails concerning funds handled by receivers.⁶⁵

⁶³ *Chicago Deposit Vault Co. v. McNulta*, 153 U. S. 554, 38 L. ed. 819; *Stone v. Trust Co.* (1914), 183 Mo. App. 261, at 278, 166 S. W. 1091.

⁶⁴ *Rountree v. Barnett* (1873), 69 N. C. 76, at 80.

⁶⁵ *Stone v. Trust Co.* (1914), 183 Mo. App. 261, at 278, 166 S. W. 1091.

§ 549. Loss of Property in Hands of Receiver. For a full discussion of the above subject, see ch. XXIX, "Liabilities of Receivers," sec. 790 et seq.

§ 550. Power of Receiver to Borrow Money. The power of a court of equity to raise money necessary for the preservation and management of the property and make the same chargeable as a lien thereon for its repayment, is to be exercised with great caution and if possible with the consent or acquiescence of the parties interested in the fund.⁶⁶

Though prior notice to persons interested by notifying them as parties, first requiring them to be made parties, if they are not, is generally the better way, yet many circumstances may be judicially equivalent to prior notice. A full opportunity to be heard on the evidence as to the necessity of the expenditures and of making them a first lien is judicially equivalent. The receiver and those lending money to him on certificates issued on orders made without prior notice to parties interested, take the risk of the final action of the court in regard to the loans. The court always retains control of the matter, its records are accessible to lenders and subsequent holders and the certificates are not negotiable instruments.⁶⁷

Bondholders in foreclosure proceedings are generally represented by their trustees, and ordinarily must be bound by their acts at least so far as concerns the power of the court to act in making orders in foreclosure and receiver proceedings and so far as the interest of third persons acting upon the faith of it might be affected.⁶⁸ However, the trust should be examined very closely to see what powers of foreclosure the trustee has, and if the bondholders are few in number and their written consent can be obtained, they should be so obtained and filed in the receivership case.

⁶⁶ *Wallace v. Loomis* (1877), 97 U. S. 146, at 162, 24 L. ed. 895.

⁶⁷ *Union Trust Co. v. Illinois M. Ry. Co.* (1885), 117 U. S. 434, at 456, 29 L. ed. 963.

⁶⁸ *Wallace v. Loomis* (1877), 97 U. S. 146, at 168, 24 L. ed. 895. See *Hames v. Buckeye*, 196 Fed. 539, cases cited.

§ 551. Power of Receiver of Railroad to Borrow Money.

The running of a railroad is a matter of public concern. The franchises and rights of the corporation which constructs it are given not merely for private gain to the corporators, but to furnish a public highway; and all persons who deal with the corporation as creditors or holders of its obligations, must necessarily be held to do so, in the view, that if it falls into insolvency and its affairs come into a court of equity for adjustment, involving the transfer of its franchises and property by a sale into other hands, to have the purposes of its creation still carried out, the court while in charge of the property, has the power and under some circumstances, it may be its duty, to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public. Its power to do this does not depend on consent, nor on prior notice. Consent is desirable but is seldom practicable where the debts exceed the value of the property.

Railroad mortgages and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests. The amounts involved are generally large and the rights of the parties oftentimes complicated and conflicting. It rarely happens that a foreclosure is carried through to the end without some concessions by some parties from their strict legal rights, in order to secure advantages that could not otherwise be attained and which it is supposed will operate for the general good of all who are interested. This results almost as a matter of necessity from the peculiar circumstances which surround such litigation.

The power of a court of equity to appoint managing receiver of such property as a railroad, when taken under its charge, as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property and make the same chargeable as a lien thereon for its repayment can not

at this day be seriously disputed. It is part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is undoubtedly a power to be exercised with great caution; and if possible with the consent or acquiescence of the parties interested in the fund.⁶⁹

§ 552. Power of Receiver of Private Corporation to Borrow Money. In the case of railroads the courts entertain a very broad and comprehensive jurisdiction over their property when placed in the hands of receivers.⁷⁰ It will be found on examining the cases that the jurisdiction asserted by the courts in such cases is largely based upon the public character of railroad corporations, the public interest in their continued and successful operations, the peculiar character and terms of railroad mortgages and upon other special grounds not applicable to ordinary private corporations.

The same reasons obtaining in the case of a railroad or other public service corporation do not obtain in the case of a receiver of a private corporation. It would be unwise, it would seem, to extend the power of the court in dealing with property in the hands of receivers to the practical subversion or destruction of vested interests as would be the case generally when an order is made, generally to the receiver, to borrow money and create a lien superior to liens already existing. The reasoning being it is best for all that the integrity of contracts should be strictly guarded and maintained and that a rigid, rather than a liberal construction of the powers of the court to subject property in the hands of a receiver to charges to the prejudice of creditors should be adopted.⁷¹

When a receiver is appointed of a private corporation the court may authorize him to continue the business temporarily,

⁶⁹ Wallace v. Loomis (1877), 97 N. Y. 423, at 436, and cases there cited, 13 N. E. 282.

⁷⁰ Raht v. Attrill (1887), 106

⁷¹ Raht v. Attrill (1887), 106 N. Y. 423, at 437, 13 N. E. 282.

provided the receiver has in his possession sufficient assets to enable him to go on, but if he should find it necessary to borrow money with which to continue the business the rule undoubtedly is that he shall not be authorized to issue receiver's certificates to raise money therefor which shall displace the lien of a subsisting encumbrance. The reason for this is very obvious. It would be a gross violation of that clause of the federal constitution which prohibits the states from passing laws violative of the obligation of contracts.

Yet the act of the court in taking charge of property through a receiver is attended with certain necessary expenses of its care and custody; and it becomes the settled rule that expenses of realization and also certain expenses which are called expenses of preservation may be incurred under the order of the court on the credit of the property and it follows, from necessity, in order to the effectual administration of the trust assumed by the court that these expenses should be paid out of the income, or when necessary, out of the corpus of the property before distribution or before the court passes over the property to those adjudged to be entitled.⁷²

Of course such certificates might displace prior lienholders' rights with the consent of such prior lienholders.⁷³

Such expenses are those for the purpose of saving the property from destruction,⁷⁴ such a case includes insurance on the property, watchman for the property, etc.

Ordinarily the carrying on of the business can not be construed to come within the "saving the property from destruction" unless possibly in a case in which it satisfactorily appeared that the continuation of the business is absolutely essential to the preservation of the property in the receiver's custody. In the case of a private corporation this necessity is made the criterion.

⁷² *Raht v. Attrill* (1887), 106 N. Y. 423, at 435, 13 N. E. 282.

⁷³ *Baltimore B. & L. Assn. v. Alderson* (1898), 90 Fed. 142.

⁷⁴ *Lockport Felt Co. v. United Box Board & P. Co.* (1908), 74

N. J. Eq. 686, at 691, 70 Atl. 980.

When the court is asked to order the receiver to borrow money and make the obligation a first lien on the property of a private corporation by the displacement of existing liens, besides the limitation thus set out above, the court should be satisfied by a preponderance of circumstances that no other course could be successfully adopted and that practical ruin would ensue if the authority were withheld. All the facts should be exhibited which make the necessity apparent; all the parties affected should be notified and a full hearing accorded to all objectors.⁷⁵

§ 553. Power of Receiver to Mortgage Property. In *Brown v. Schintz*,⁷⁶ the Appellate Court of Illinois holds that an order to the receiver authorizing him to borrow \$600 and to execute and to deliver a receiver's certificate or obligation therefor is carried out by the receiver giving a mortgage. The court, however, admits that it is unusual for a receiver to give a mortgage to secure money loaned to him, yet they can see no harm in doing so, especially when no remedy in any of the covenants of the mortgage is sought.

In the case there decided the lien of the certificate-holders was held good. It would seem, however, it was good by reason of the order of court and by the instrument of the receiver stating that the money borrowed was secured by a first lien on the premises, rather than that the receiver made it good by issuing a mortgage. How a receiver can issue a mortgage, it is hard to see except in special cases when he has the legal title,—ordinarily a chancery receiver has but possession and that possession is really the possession of the court. Whatever right the receiver has to mortgage, if he has any, is because of an order of court authorizing a lien, or charge. If the court can make an order putting a lien on the property, the lienholder has no further or better lien by the receiver issuing a mortgage.

⁷⁵ *Porch v. Agnew* (1905), 70 N. J. Eq. 328, 61 Atl. 721.

⁷⁶ *Brown v. Schintz* (1901), 98 Ill. App. 452, at 459.

§ 554. Power of Receiver to Conduct Railroad Business.

The province of a court of law and equity is to decide controversies and after deciding to make an order to carry out the decision. Ordinarily it is not the function of a court to administer. The courts have in recent times taken upon themselves the running of railroads and other public service corporations by means of a receiver. A railroad corporation is a quasi-public institution charged with the duty of operating its road as a public highway. If the company becomes embarrassed and unable to perform that duty, the courts, pending proceedings for the sale of the road, will operate it by a receiver, and make the expenses incident thereto a first lien. This is done on account of the peculiar character of the property.⁷⁷

§ 555. Power of Receiver to Conduct Quasi-Public Business. Courts of equity have power to appoint receivers of quasi-public corporations, such as street car corporations,⁷⁸ water companies,⁷⁹ electric power companies,⁸⁰ etc. Such orders may provide that the receivers shall continue the business, operate the corporations and exercise their rights and franchises.⁸¹

§ 556. Power of Receiver to Conduct Ordinary Business. Private corporations owe no duty to the public and their continued operation is not a matter of public concern.⁸²

The purpose of a court in appointing a receiver is to preserve the money fund or property for those entitled to receive the same at the close of the case upon which the receivership is predicated. With this in mind the only justification the court can have in making an order to a receiver to continue

⁷⁷ Farmers Loan & Trust Co. v. Grape Creek (1892), 50 Fed. 481, at 482.

⁷⁸ In re Metropolitan Railway Receivership (1907), 208 U. S. 90, 52 L. ed. 403.

⁷⁹ Atlantic Trust Co. v. Dana (1903), 128 Fed. 209.

⁸⁰ Gary v. Hudson River Electric Power Co. (1909), 173 Fed. 1003.

⁸¹ Gary v. Hudson River Electric Power Co. (1909), 173 Fed. 1004.

⁸² Farmers Loan & Trust Co. v. Grape Creek (1892), 50 Fed. 481, at 482.

the business is to preserve this money fund or property by so doing. Sometimes this is justifiable, goodwill and trade are valuable and may be lost by closing down a business. Often contracts are partly completed and may be ordered completed. Also a business may be sold as a going concern often to much better advantage than when shut down.⁸³

On the other hand, if the business before the receiver took hold can not make a profit, it very seldom happens that it can make a profit in the hands of a receiver because to a great extent the business is disorganized, the trade is suspicious and the credit, if any, is lost. In most cases a business run under a receiver loses money. If it is run but temporarily in order to reorganize and loses a comparative little money, such running under a receiver may be justified. If run for a short time for the purpose of a sale as a going concern, it may be justified because the increase in the selling price as a going concern over the comparatively little loss from conducting the business, may in the end bring a large return to the creditors. However, nothing can ordinarily be gained for the creditors by a prolonged running of the business by the receiver.

There is a discretion on the part of the court to permit the business to be carried on temporarily when the interests of the parties seem to require it. Under such circumstances the power of the receiver to incur obligations for supplies and materials incidental to the business follows as a matter of necessity incident to the receivership.⁸⁴

Ordinarily a business should not be continued any longer than is necessary to properly advertise and dispose of it as a going concern,⁸⁵ and if the receiver, when running a business, finds that it is losing money, he should promptly report the fact to the court and ask for instructions in the premises.

⁸³ *Gutterson & Gould v. Lebanon Iron & Steel Co.* (1907), 151 Fed. 72, at 74.

⁸⁴ *Barton v. Barbour* (1881), 104 U. S. 126-135, 26 L. ed. 672; *Thompson v. Phoenix Ins. Co.* (1889), 136

U. S. 287-293, 34 L. ed. 408; *Welch v. Renshaw* (1900), 59 Pac. 967, 14 Colo. App. 526.

⁸⁵ *Fleming v. Fleming Hotel Co.* (1905), 70 N. J. Eq. 509, at 514, 61 Atl. 739.

In the absence of express authority from the court, a receiver placed in charge of a drug store, pending litigation had no right to continue the business and a bill of expenses presented was held properly refused.⁸⁶ Similarly a receiver appointed to take charge of a stock of groceries pending litigation was not allowed to conduct a grocery business therewith. When such receiver did not conduct a grocery business he was not allowed compensation for such services but he was allowed compensation commensurate with the work he was ordered to perform.⁸⁷

§ 557. Power of Receiver under Court Orders to Undertake New Enterprise. The power of a court to undertake through its receiver new and extensive enterprises is one to be exercised with great caution and only under exceptional circumstances. Yet the court has such power. It is done on the theory that such new enterprises are necessary to preserve the property. It is rare that such new enterprises are entered into at the expense of the bondholders of an insolvent corporation against their protest.⁸⁸

§ 558. Power of Receiver to File or Record Liens. Said the Supreme Court of Errors of Connecticut in the matter of a receivership of a contracting business: "We know of no reason why the receiver might not file a lien to secure himself for materials and labor furnished in carrying out the Fenton Company contract. In case there were other creditors liable to attach or otherwise obtain a preference it might be his duty to do so." ⁸⁹

§ 559. Power of Receiver to Question Previous Acts of Defendant. It is the right and the duty of a receiver or other

⁸⁶ Terry v. Martin, 7 N. M. 54, 32 Pac. 157.

⁸⁷ Face v. Hall (1915), 148 N. W. 777, 183 Mich. 22.

⁸⁸ Kennedy v. Railroad Co., 5

Dill. 592; Fidelity T. & T. Co. v. Kansas Nat. Gas Co. (1913), 219 Fed. 614, at 618.

⁸⁹ Fenton v. Fenton Bldg. Co. (1915), 90 Conn. 7, 96 Atl. 145.

fiduciary to raise the question as to the validity of an agreement between the defendant and a third party alleged to be usurious. The receiver acts for all who have interests against the defendant borrowing company and is therefore in a different position in court from a borrower who seeks the aid of a court against the lender on the ground of usury.⁹⁰

§ 560. Power of Receiver to Compromise Claims.^{90a} There may be cases in which the trial court appointing the receiver may not have technically power to adjudicate and settle certain disputes between the defendant and third parties, nevertheless the appointing court has been allowed to order its receivers to settle such controversies and compromise such a case even with the disapproval of some of the creditors. Such an order by the court was held appealable by the dissenting creditors since their interests were directly involved and affected by such action. However, an appellate court can not set aside such an order of the appointing court unless it appears to have been so unreasonable under the circumstances as to amount to a clear abuse of judicial discretion.⁹¹

A receiver, however, with no other authority than of having been "duly appointed," is not authorized to compromise claims owned by the defendant against a debtor by accepting a less amount than is actually due upon condition that the debtor shall pay a part of the compromise amount to a creditor of the insolvent to the full amount of the creditor's claim.⁹²

A receiver may be authorized by the court to compromise claims of the defendant company against third parties.⁹³

§ 561. Powers of Successive Receivers. In a legal sense property placed by a court in the hands of a receiver is not

⁹⁰ *James Bradford Co. v. United Leather Co.* (1915), 95 Atl. (Del.) 308. Power of receiver to question act of predecessor. See *Baker v. Schofield* (1917), 243 U. S. 114, at 118, 61 L. ed. 626, 37 S. Ct. Rep. 333.

^{90a} Receiver in bankruptcy can not compromise claims. See "Receivers in Bankruptcy Proceedings," ch. XVII.

⁹¹ *MacDonald v. Aetna Indemnity Co.* (1914), 88 Conn. 571, 92 Atl. 154.

⁹² *Buffalo Forge Co. v. Columbus & H. C. C. Co.* (1908), 146 N. Y. St. Rep. —, 112 N. Y. S. 460.

⁹³ *Pennsylvania Steel Co. v. New York City Ry. Co., et al.* (1910), 180 Fed. 514; *Alexander v. Maryland Trust Co.* (1907), Court of Appeals of Md., 66 Atl. 836.

in the possession of the receiver but in possession of the court through such receiver as its officer.⁹⁴ After properties have once been taken in custodia legis by a court the removal or change of the personnel of the receiver does not take the property out of the possession of the court. Successive receivers have the rights, powers and duties of their predecessors in such receivership.⁹⁵

§ 562. Powers and Duties of Joint Receivers. Thompson, United States District Judge for the Western District of Pennsylvania, has held that a receiver or receivers are presumptively chosen because the court believes he will execute the trust reposed in him with wisdom, diligence and fidelity, nor does it follow that he should necessarily yield his judgment to or be governed in his actions by his co-receivers who may constitute a majority. The majority is not always right and in the end he must answer for himself on all questions of fidelity in the exercise of the trust; accordingly where a mortgagee of the corporation in the hands of three federal court-appointed receivers was allowed by the federal court to bring suits to protect its rights and such mortgagee brought suit in a state court, such mortgagee submitted its cause to such state court for final adjudication under the laws of the state. Two of the joint receivers filed an answer admitting the more material averments of the bill. The third receiver, believing that there was a valid legal defense to the action, interposed such defense. The proceedings being adversary the third receiver did not need the consent of the federal court to file this answer, the right to file it inhered in his office and the federal court refused to restrain the third receiver from prosecuting in good faith an appeal from a decree of the state court adjudging the mortgage a valid lien.⁹⁶

⁹⁴ Thompson v. Phoenix Ins. Co., 136 U. S. 287, 34 L. ed. 408; McKinnon-Young Co. v. Stockton (1908), 55 Fla. 708, 46 So. 87.

⁹⁵ McKinnon-Young Co. v. Stockton (1908), 55 Fla. 708, 46 So. 87.

See Baker v. Schofield (1917), 243 U. S. 114, 61 L. ed. 626, 37 S. Ct. Rep. 333.

⁹⁶ Goodman Mfg. Co. v. Pittsburgh-Buffalo Co. (1915), 222 Fed. 144.

§ 563. **Power of Receiver Appointed over Property Held in Trust by Third Parties.** A court of equity has control of trusts and trustees, it may, for cause, displace a trustee appointed by contract or otherwise, and name another in his stead. When the trustee is carrying out the trust it may not limit the exercise by the trustee of his powers under the trust agreement; it may restrain the abuse of his powers, but it can not control the exercise of the legal discretion vested in him under the trust agreement.

When a receiver is appointed over property of a corporation or individual and such corporation or individual has pledged certain of its property with a trustee the court appointing the receiver can not by the mere appointment of the receiver take such property out of the hands of the trustees or pledgees and administer it through the receiver, because any such action by the court would be a breach of a contract created by the pledge or trust.⁹⁷

A court has no power in a proceeding under the New York Code of Civil Procedure for the voluntary dissolution of a corporation to restrain creditors of the corporation from disposing of its bonds held as collateral to loans under lawful contracts empowering them to sell.⁹⁸

When a receiver is appointed over property mortgaged or otherwise encumbered or in which a third party claims an interest and the receiver is not meeting the claims of such a party, the only course open for such a party, and the correct one, is to obtain leave of the court appointing the receiver and intervene in the receivership, setting forth the facts showing the claimant's rights in the premises and containing ample prayers to entitle its claim to recognition.⁹⁹

⁹⁷ *Brackett v. Middlesex Banking Co.* (1915), 89 Conn. 645-657, 95 Atl. 12; *Matter of B. G. E. Co.* (1894), 143 N. Y. 261, 38 N. E. 297; *Risk v. Kansas Trust Co.* (1893), 58 Fed. 45; *Brady v. Furlow* (1857), 72 Ga. 613; *Atlantic Trust Co. v. Dana* (1903), 128 Fed. 209, at 219.

⁹⁸ *Matter of B. G. E. Co.* (1894), 143 N. Y. 261, 38 N. E. 297; *Ruggles v. Chapman* (1874), 59 N. Y. 163; *Matter of H. P. S. F. Asso.* (1891), 129 N. Y. 288, 29 N. E. 323. See *Fidelity Ins. Co. v. Roanoke Iron Co.* (1896), 81 Fed. 439.

⁹⁹ *Atlantic Trust Co. v. Dana* (1903), 128 Fed. 209, at 218.

§ 564. Power of Receiver over Property Pledged by Debtor.

“Courts of equity do not for the receiver or for other parties complainant, divest citizens of property which it is admitted they rightfully hold as security, at least not without actually relieving them of the obligation to secure which the property was pledged to them.”¹ Likewise when a debtor has deposited collateral with a trustee as security for the payment of his debt. the trustee can not be compelled to surrender to receivers of the insolvent debtor the collateral until the debt is paid.²

Receivers have no greater rights of property than the individual or corporation in the hands of receivers.³ They take its assets burdened with all valid liens and equities against it.⁴

“The general rule is well established that a receiver takes the title of the corporation or individual whose receiver he is and that any defense which would have been good against the former may be asserted against the latter; but there is a recognized exception which permits a receiver of an insolvent individual or corporation in the interest of creditors to disaffirm dealings of the debtor in fraud of their rights.”⁵

¹ *Security Trust Co. v. Dinsmore* (1915), 152 N. W. (Mich.) 964, 186 Mich. 273.

² *Brackett v. Middlesex Banking Co.* (1915), 89 Conn. 645, at 655, 95 Atl. 12.

³ *O'Dell v. H. Batterman Co.* (1915), 223 Fed. 292, at 297; *Brackett v. Middlesex Banking Co.* (1915), 89 Conn. 645, at 654, 95 Atl. 12.

⁴ *Merwin v. Austin*, 38 Conn. 22, at 34, 18 Atl. 1029; *In re Wilcox & Howe Co.*, 70 Conn. 220, at 231, 39 Atl. 163; *Brackett v. Middlesex Banking Co.* (1915), 89 Conn. 645, at 654, 95 Atl. 12.

⁵ *Pittsburg Carbon Co. v. MacMillan, Rec.*, 119 N. Y. 146, 23 N. E. 530; cited in *American Can Co. v. Erie Preserving Co.* (1909), 171 Fed. 540, at 542.

CHAPTER XXIII

RECEIVER'S CERTIFICATES AND RECEIVER'S LOANS

ANALYSIS

- § 565. What Are Receiver's Certificates.
- § 566. Receiver's Certificates Not Negotiable.
- § 567. Receiver's Certificates Not an Absolute Promise.
- § 568. Holders of Receiver's Certificates Affected by Decrees of Court.
- § 569. Power of Court to Authorize Receiver's Certificates.
- § 570. Purpose of Issuing Receiver's Certificates.
- § 571. Receivers of Railways Commonly Issue Receiver's Certificates.
 - (a) Purpose for Which Railroad Receiver's Certificates are Issued.
 - (b) Circumstances under Which Railroad Receiver's Certificates Are Issued.
 - (c) Receivers of Leased Line Issuing Receiver's Certificates.
- § 572. Receivers of Private Corporations Issuing Receiver's Certificates.
- § 573. Receivers of Quasi-Public Corporations Issuing Receiver's Certificates.
- § 574. Receivers of Street Railways Commonly Issue Receiver's Certificates.
- § 575. Liens Created by Receiver's Certificate, if Any.
- § 576. Power of Court to Create Debts a Charge on Corpus.
 - (a) Railway Cases.
 - (b) Private Corporation Cases—When Can Not Issue Certificates.
 - (c) Private Corporation Cases—When Can Issue Certificates.
- § 577. Administration Expense Ahead of Receiver's Certificates.
- § 578. Proceedings Necessary to Issue Receiver's Certificates.
- § 579. Proceedings Necessary to Collect Receiver's Certificates.
- § 580. Interest on Receiver's Certificates.
- § 581. Assignment of Receiver's Certificates.
- § 582. Receiver's Notes and Bonds.
- § 583. Effect of State Statutes on Receiver's Certificates under State Practice.
- § 584. Effect of State Statutes on Receiver's Certificates, under Federal Practice.

§ 565. What Are Receiver's Certificates. We have elsewhere discussed the power of the sovereign acting through the

courts to take possession of property within its territorial limits and preserve it or realize it for litigants.¹

"A receiver's certificate is evidence in the hands of the holder that he is entitled to receive from the funds under the control of the court that authorized its officer to issue them, the amount specified, if the fund is sufficient to pay all holders of such certificates, or if it is not sufficient, then only a pro rata with other holders."² "The certificates are not debts of the company (which is in the hands of the receiver), but of the receiver backed by the pledged faith of the court that the property or the proceeds of which they are charged, is in its possession subject to be and that it will be disposed of by it for the payment of them."³ "Receiver's certificates, being merely evidence of indebtedness, can have no higher character than the debts of which they are the representatives."⁴ If a court has power to order its receiver to borrow money or borrow credit, it has power to authorize its receiver to issue receiver's certificates for that money or credit, or in certain cases, store orders, or orders by whatever name they are called. However, the giving of these signed orders in itself can not give the certificates of indebtedness any higher character than the debt itself, of which the order is but evidence.⁵ Receiver's certificates are ordinarily given by railroad receivers, but they can be issued by other receivers. However, the doctrine that current expenses must be paid out of current earnings, even at the expense of bondholders, which is applicable to railway receiverships because they are quasi-public corporations,⁶ does not ordinarily apply to private corporations.⁷ Taft, J., in discussing the subject and receiver's certificates said: "It is well established in the federal courts by numerous decisions of the Supreme Court of the United

¹ See ch. III, *supra*.

² *Turner v. Railway* (1880), 95 Ill. 134, at 145.

³ *Meyer v. Johnson* (1875), 53 Ala. 237, at 349.

⁴ *Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co.* (1889), 42 Fed. 377.

⁵ *Fidelity Ins., etc., Co. v. Shenandoah Iron Co.* (1889), 42 Fed. 377.

⁶ *Fosdick v. Schall*, 99 U. S. 254, 25 L. ed. 339.

⁷ *Fidelity Ins., etc., Co. v. Shenandoah* (1889), 43 Fed. 377.

States, that a court of equity, which, in foreclosure or other suits, has taken into its custody railroad property, may authorize its receivers to borrow money for the preservation, maintenance or necessary betterment of the road, and may by its order, make the loans thus incurred a paramount lien on the income and corpus. *Wallace v. Loomis*, 97 U. S. 146; *Union Trust v. Illinois M. Ry. Co.*, 117 U. S. 436, 6 Sup. Ct. Rep. 809. The court does not act as the agent for the parties in the sense that it creates the lien by contract of the parties with the lenders, but by virtue of its custody of the property and its jurisdiction of the parties it pledges its own faith to the lender that it will enforce such a lien against the property and the parties as a condition of its releasing the property, and of its enforcing any equities in favor of those who invoke its assistance." *Taft, J., Mercantile Trust Co. v. Kanawha* (1892), 58 Fed. 6.

§ 566. Receiver's Certificates Not Negotiable. A statement will be found in *Meyer v. Johnston* (1875), 53 Ala. 349, by Manning, J., to the effect that negotiable certificates of indebtedness may be issued by receivers. In spite of this statement, the modern authorities are to the effect that receiver's certificates are not negotiable.⁸ Even if the terms of the order authorizes and empowers the receiver to issue a negotiable receiver's certificate the holder of one of these certificates can not claim to hold as an innocent purchaser without notice in the sense which that phrase imparts, for certificates of this kind have not the quality of negotiable instruments under the law merchant. They are not commercial paper, and the purchaser or assignee can only recover upon them to the extent of the rights of the first payee. He is put upon inquiry as to all that was done in the cause wherein the certificates are issued, and chargeable with notice.⁹ "The receiver and those

⁸ *McCarthy v. Crawford* (1909), 238 Ill. 38, at 47, 86 N. E. 750.

⁹ *Decker Bros. v. Berner's Bay Mining Co.* (1907), 3 Alaska 280, at 297; *Bernard v. Union Trust Co.*

(1908), 159 Fed. 623; *St. Louis Union Trust Co. v. Texas Southern Ry. Co.* (1910), Texas Civ. App., 126 S. W. 297.

lending money to him on certificates issued on orders made without prior notice to the parties interested take the risk of the final action of the court in regard to the loans. The court always retains control of the matter; its records are accessible to lenders and subsequent holders and the certificates are not negotiable instruments.''¹⁰

It is essential to the negotiability of an instrument that it be payable absolutely and unconditionally, not depending on any contingency, either in regard to the event or the fund out of which payment is to be made, or as to the parties by or to whom payment is to be made, otherwise such instruments are not assignable either at common law or under the statutes of most states so as absolutely to transfer and vest the property in the assignee and enable him to maintain an action in his own name so ignoring the chain of title. An instrument for the payment of money, not assignable as to cut off reference to the chain of title and not negotiable as those words are used in the law merchant is subject to the same defenses in the hand of the holder, notwithstanding he may have in good faith, paid full value therefor, as could be, made against the original payee.¹¹

§ 567. Receiver's Certificates Not an Absolute Promise. A receiver's certificate is not an absolute promise to pay. It is a promise to pay only from a fund in court in process of administration and subject only to the orders of the court which is administering it. The payment of the certificate in full is conditioned upon the sufficiency of the fund to answer all claims of equal priority. If insufficient to pay all, proportional payment only could be demanded. The court, in whose control the fund is, is alone competent to determine

¹⁰ Union Trust Co. v. Illinois Midland Co., 117 U. S. 434, at 456, 29 L. ed. 963; Stanton v. Alabama, etc., Ry. (1875), 2 Woods 506; Bank of Montreal v. Railway (1878), 48 Iowa 524; see Stanton v.

Alabama, etc. (1867), 31 Fed. 587; McCarthy v. Crawford (1909), 238 Ill. 38, at 47, 86 N. E. 750.

¹¹ Turner v. P. & S. R. R. Co. (1880), 95 Ill. 145.

the sufficiency of the fund and the proper proportional payment, if it is insufficient for payment in full.¹²

All persons dealing in receiver's certificates must know that payment can only be coerced by application to the court having the control of the trust property for an order upon its acting officer.¹³

§ 568. Holders of Receiver's Certificates Affected by Decrees of Court. The true rule is that where a sale is not expressly made subject to receiver's debts, the holders of such claims must depend for their ultimate rank and payment upon the final decree made in the cause wherein they were issued. Having obtained these claims pendente lite, they are privies and affected by subsequent decrees.¹⁴ A holder of receiver's certificates issued pendente lite being privy to the cause is affected and bound by a decree which operates to transfer the lien of his certificates to the proceeds of sale.¹⁵

§ 569. Power of Court to Authorize Receiver's Certificates. In England, the courts will sometimes permit a receiver and manager of a railroad¹⁶ and other public utility¹⁷ and also a business other than a railroad or public utility, to borrow money on the security of the property in his control and make the certificates or other evidences of debt a charge upon the whole undertaking in priority to debentures or other lien if the money is necessary for the preservation of the assets and

¹² In re C. M. Burkhalter & Co. (1910), 179 Fed. 403 (a bankruptcy receivership case).

¹³ Turner v. P. & S. Ry. Co. (1880), 95 Ill. 134; approved in In re C. M. Burkhalter & Co. (1910), 179 Fed. 405; St. Louis Union Trust Co. v. Texas Southern Ry. Co. (1910), 126 S. W. 296, Texas Civ. App.

¹⁴ Becker Bros. v. Berner's Bay Mining Co. (1907), 3 Alaska 280, at 297. See 58 Fed. 17; Bernard v.

Union Trust Co. (1908), 159 Fed. 623; St. Louis Union Trust Co. v. Texas Southern Ry. Co. (1910), 126 S. W. 297, Texas Civ. App.

¹⁵ Columbus, etc., Appeals (1901), 109 Fed. 177. See Metropolitan T. Co. v. Kanawha (1893), 58 Fed. 6; Gordon v. Newman (1894), 62 Fed. 686.

¹⁶ Greenwood v. Algecaus Ry. Co. (1894), 2 Ch. 205.

¹⁷ In re British Power, etc. (1906), 1 Ch. 497.

good will, as in the case of a theater, for instance,¹⁸ or copper mine.¹⁹

In America, the power of a court to authorize a receiver to borrow money and give security, which will be a charge on the assets of the debtor in the hands of the receiver, in preference to lienholders, has been restricted to railroad receivership,²⁰ with a few exceptions.²¹

The authority to disturb existing liens should be exercised with great caution, and should be carried no further than actually necessary to attain the desired result.²²

Property subject to liens and claims and debts of various characters and ranks, which is brought within the cognizance of a court of equity for administration, and conversion into money and distribution is a trust fund. It is to be preserved for those entitled to it. This must be done by the hands of the court, through officers. The character of the property gives character to the particular species of preservation which it requires. Unimproved land may lie idle, with only payment of taxes, improved property should be rented. Movable property that is not perishable may be locked up and kept; but if perishable it must be sold, by way of preservation. A railroad and its appurtenances is a peculiar species of property. Not only will its structures deteriorate and decay and perish if not

¹⁸ *Securities & Properties Corp. v. Brighton Alhambra* (1893), 62 L. J. Ch. 566.

¹⁹ *Glasder Copper Mines, Ltd.* (1906), C. A. 1 Ch. D. 365.

²⁰ *Cowden v. Wild Goose M. & T. Co.* (1912), 199 Fed. 561, at 567, 126 S. W. 302; *Bernard v. Union Trust Co.* (1908), 159 Fed. 623; *Union Trust Co. v. Illinois M. R. Co.*, 117 U. S. 455, at 456, 29 L. ed. 963; *American Brake Shoe & Foundry Co. v. Pere Marquette R. Co.* (1913), 205 Fed. 14, at 19; *Wood v. Guarantee Trust Co.*, 128 U. S. 416, 32 L. ed. 472; *International Trust Co. v. Decker Bros.* (1907), 152 Fed. 78, at 83, cases cited; *Farmers Loan & Trust Co. v. Grape Creek Coal Co.*,

50 Fed. 481; *Fidelity Ins. T. & S. D. Co. v. Roanoke Iron Co.*, 68 Fed. 623; *Knickerbocker T. Co. v. O. C. & R. S. Ry. Co.* (1911), 201 N. Y. 379, at 385, 94 N. E. 871.

²¹ See *Porch v. Agnew* (1904), 57 Atl. 547; reviewed in 70 N. J. E. 328, 61 Atl. 721; *Lockport, etc., v. Union Box* (1908), 74 N. J. E. 686, 70 Atl. 980. See matter discussed more in detail.

²² *American Brake S. & F. Co. v. Pere Marquette R. Co.* (1913), 205 Fed. 14, at 19. See *Wallace v. Loomis*, 97 U. S. 146, 152, 162, 24 L. ed. 895; *Millenberger v. Railroad*, 106 U. S. 286, at 309, 27 L. ed. 117; *Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 29 L. ed. 963; *Atlantic Trust Co. v. Chapman*, 208 U. S. 360, at 371, 52 L. ed. 528.

cared for and kept up, but its business and goodwill will pass away if it is not run and kept in good order. Moreover, a railroad is a matter of public concern. The franchises and rights of the corporation which constructed it were given not merely for private gain to the corporators, but to furnish a public highway; and all persons who deal with the corporation as creditors or holders of its obligations, must necessarily be held to do so in the view, that if it falls into insolvency, and its affairs come into a court of equity for adjustment, involving the transfer of its franchises and property, by a sale, into other hands, to have the purpose of its creation carried out; the court, while in charge of the property, has the power and under some circumstances, it may be its duty, to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public. Its power to do this does not depend on consent nor on prior notice.²³

In America, courts will authorize a receiver of a private corporation to issue receiver's certificates, but will not make the receiver's certificates a first lien on the mortgaged property prior to the lienholder, except in a few isolated cases.²⁴

Sec. 2, par. 2, of the Bankruptcy Act, July 1, 1898, c. 541, 30 Stat. 546 (U. S. Comp. Stat. 1901, p. 3421), and its amendment, expressly vest courts of bankruptcy with the power to authorize the business of bankrupt to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estate. Under such authority receivers have been authorized to issue receiver's certificates.²⁵

§ 570. Purpose of Issuing Receiver's Certificates. Said Carland, United States District Judge, speaking for the United States Circuit Court of Appeals of the Eighth Circuit, as follows: "The power to authorize the issuance of certificates

²³ *Union T. Co. v. Illinois Midland Co.* (1885), 117 U. S. 434, at 455, 29 L. ed. 963; *American Brake Shoe & F. Co. v. Railway* (1913), 205 Fed. 19; see *Cowden v. Wild Goose Min-*

ing & Trading Co. (1912), 199 Fed. 561, at 567.

²⁴ See sec. 572, *infra*.

²⁵ *In re Erie Lumber Co.*, 150 Fed. 817, at 827.

is limited by and is coextensive with its obligation to conserve the property in its custody, and any expenditure of money that has not this primary purpose for its object is beyond the power of the court and unauthorized. To create an indebtedness which shall have priority over the claims of persons interested in the property taken possession of by the court is a serious matter."²⁶

Some of the purposes for which receiver's certificates have been issued and approved of by the court are:

For purchasing new equipment including new rails, new engine houses, coaling plants, yards, new depots. Such purchases were construed to be immediately necessary for the conservation and proper operation of the road,²⁷ and courts have gone so far as to allow them to be issued by a receiver of a street railway company for the improvement, acquisition, preservation or maintenance of property which is covered by the mortgages which are preceded in payment by the certificates.²⁸

The power to postpone existing liens to liens to charges or quasi-liens created by the court for the purpose of completing an unfinished railroad, has rarely been exercised and ought not to be exerted unless it can be done without ultimate loss to the existing lienholders.²⁹ Where such charges are created by the court it should be by the consent of first lienholders.³⁰ The supreme court, speaking through Blatchford, J., has upheld the issue of receiver's certificates for the purpose

²⁶ *Illinois Steel Co. v. Ramsey* (1910), 176 Fed. 853, at 865.

²⁷ *American Brake S. & F. Co. v. Pere Marquette Railroad Co.* (1913), 205 Fed. 14, at 19.

²⁸ *Pennsylvania Steel Co., et al., v. New York City Ry. Co.* (1908), 161 Fed. 787.

²⁹ *Shaw v. Little Rock & Ft. S. R. Co.*, 100 U. S. 605, 25 L. ed. 757; *Bibber-White Co. v. White River Valley Elec. Co.*, 115 Fed. 786, at 790; *Farmers L. & T. Co. v. Burbank Power & W. Co.*

(1912), 196 Fed. 539, at 542; *Davis v. Jacksonville & P. Ry. Co.* (1913), 180 Ill. App. 1.

³⁰ *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895; *Kennedy v. Railroad*, 5 Dill. 519; *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, 29 L. ed. 963; *Jerome v. McCarter*, 94 U. S. 734, 24 L. ed. 136; *Farmers L. & T. Co. v. Burbank Power & W. Co.* (1912), 196 Fed. 539, at 542; *Bibber-White Co. v. White River Valley Elec. Co.*, 115 Fed. 786, at 790.

of obtaining rolling stock and building six miles of bridge and part of a main line of railroad ninety-two miles long. This was done without the consent or approval of the lienholders.

The court seems to have allowed such certificates to stand ahead of the lienholders on three grounds: That the lienholders did not question in good season the authority to issue the certificates. That it would not work upon innocent parties dealing with the receiver within the authority of its order, consequences which result from the inequitable negligence and unfairness of a party to the suit or those represented by him.³¹

Receiver's certificates may be ordered issued by the receiver of a railroad for the purpose of paying labor claims within prescribed periods as to time and other incidental and necessary expenses for carrying forward the business of the corporation so that it may continue a going concern, and such certificates may thereby supplant or supersede the liens of mortgage claimants.³²

Receiver's certificates have been ordered issued by the receiver of a street railway company superior in lien to a general and collateral mortgage and the refunding mortgage, with the provision that the proceeds of the certificates shall be only used to the improvement, preservation or maintenance of property covered by the said two mortgages.³³

§ 571. Receivers of Railways Commonly Issue Receiver's Certificates. It is common knowledge that many railways in the United States have at some time during their career passed into the hands of a receiver. It is a matter of public concern

³¹ *Miltenberger v. Logansport Railway Co.* (1882), 106 U. S. 286, at 308, 27 L. ed. 117.

³² *International Trust Co. v. Decker Bros.* (1907), 152 Fed. 78, at 82.

³³ *Pennsylvania Steel Co. v. New York Cent. Ry.* (1908), 161 Fed. 787; see *Pennsylvania Steel Co. v. New York Cent. Ry.* (1908), 163 Fed. 242; *Pennsylvania Steel Co. v. New York Cent. Ry.* (1908), 165 Fed. 477.

that the railway be run and in addition less money in the end is generally lost by the creditors of a railway by running even at a small temporary loss than would happen if it were closed down and then sold out. When receivers are running a road they frequently need to borrow money and this money runs into large amounts. If individuals or even banks loan this money, they want it in transferable securities even if they can not have securities negotiable by the law merchant. When the money is loaned to receivers, it is ordinarily evidenced by receiver's certificates.

(a) Purpose for Which Railroad Receiver's Certificates are Issued. The underlying purpose for which receiver's certificates may be issued under court order by receivers of railways is not for the completion of an unfinished work,³⁴ or the improvement, beyond what is necessary for its preservation of an existing one—but to keep it up, to conserve it as a railroad property, to prevent the inconvenience to the public and loss to those interested.³⁵

Receiver's certificates were approved by the United States Supreme Court for the purpose of enabling the receiver to finish a canal in the hands of a receiver with no funds to finish it. None of the creditors secured by mortgages objected.³⁶

A railroad receiver was permitted to borrow money and issue receiver's certificates for the purpose of purchasing rolling stock, adjust liens thereon and construct certain parts of the main line and a bridge which parts contributed materially to the value of the road.³⁷

(b) Circumstances under Which Railroad Receiver's Certificates Are Issued. The circumstances which will justify a court in ordering its receiver to issue receiver's certificates

³⁴ Bibber, *White & Co. v. White River Elec.*, 115 Fed. 786, at 790.

³⁵ Meyer v. Johnson (1875), 53 Ala. 237, at 348.

³⁶ Jerome v. McCarter (1876), 94 U. S. 734, 24 L. ed. 136.

³⁷ Miltenberger v. Logansport, etc. (1882), 106 U. S. 286, 27 L. ed. 117; Union Trust Co. v. Illinois Midland Co. (1885), 117 U. S. 434, 29 L. ed. 963.

was summed up so well by Manning, J.,³⁸ of Alabama, in 1875 that we state the substance here.³⁹

A court of chancery has power after proper notice to and hearing of interested parties to authorize its receiver to issue certificates of indebtedness creating a first lien, displacing other liens to that extent, on the property of a railroad which it is operating, through its receiver, whenever it is necessary to raise money for the economical management and conservation of the property. A detailed statement ought also to be made out specifying the sums needed and for what they are needed, and clear proof be adduced of the correctness of this statement and of the necessity that the money be raised.⁴⁰

Says Carland, United States District Judge, writing the opinion for the Circuit Court of Appeals, Eighth Circuit:⁴¹ "When a court of equity takes possession of railroad property, through its receiver, for the benefit of all having an interest therein, its honor and integrity is pledged as a guaranty that so far as the court can control the matter everything will be done to conserve and protect that property. It is because of this responsibility and obligation that, in proper cases, the court may authorize its receiver to issue certificates for the purpose of raising money where the income of the road is insufficient for the proper conservation of the same pending the litigation. The power to authorize the issuance of certificates is limited by and is coextensive with, its obligation to conserve the property in its custody, and any expenditure of money that has not this primary purpose for its object is beyond the power of the court and unauthorized. To create an indebtedness which shall have priority over the claims of all persons interested in the property taken possession of by the court is a serious matter."⁴²

³⁸ Meyer v. Johnson (1875), 53 Ala. 313.

³⁹ Note Manning, J., speaks of negotiable certificates of indebtedness. It must be noticed that receivers' certificates are really not negotiable. See sec. 566.

⁴⁰ Meyer v. Johnson (1875), 53 Ala. 313.

⁴¹ Illinois Steel Co. v. Ramsay (1910), 176 Fed. 853, at 865.

⁴² Illinois Steel Co. v. Ramsey (1910), 176 Fed. 853, at 865.

(c) Receivers of Leased Line Issuing Receiver's Certificates.

It has been held that receivers of a street railroad who have been authorized to issue receiver's certificates for betterment and equipment purposes which are made a lien on the property superior to the mortgages, may properly use proceeds of such certificates in making repairs on the roadbed of a leased line where it is an essential part of the system, and the lease, which it is the purpose of the receivers and court to continue, requires the lessee to make repairs and such repairs are essential to the maintenance of efficient service and the protection of the rolling stock from excessive wear and tear.⁴³

The justification of displacing liens is the preservation of the property upon which they exist, and when but one common debtor is involved, the preference affects only the lien creditors because the debtor owing all the debts alike is indifferent to the order in which they are paid. When, however, * * * there is a lessee defendant and an owner defendant, both of whom are insolvent, though it may be proper to displace for the common benefit liens upon both of the properties, still it is proper to determine whether inter se the debt of the lessee should be imposed upon the lessor or the liens in the lessor's property be displaced for the benefit of strangers to the lien creditors, viz., the lessee and its creditors.⁴⁴

§ 572. Receivers of Private Corporations Issuing Receiver's Certificates. The most frequent issues of receiver's certificates are by railway receivers, nevertheless receiver's certificates are sometimes issued by receivers of private corporations.⁴⁵ Since receivers of private corporations may at times be authorized to borrow money they may be authorized to give receiver's certificates, or evidence of indebtedness to the lenders of this money,⁴⁶ for receiver's certificates have no higher character

⁴³ *Pennsylvania Steel Co. v. New York, etc.* (1908), 165 Fed. 477; see also same case, 161 Fed. 787.

⁴⁴ *Pennsylvania Steel Co. v. New York City Ry.* (1908), 163 Fed. 242.

⁴⁵ *Title Ins. & Trust Co. v. Cal. Dev. Co.*, 152 Pac. 564, 171 Cal. 227.

⁴⁶ *Securities & Properties Corp. v. Brighton* (1893), 62 L. J. Ch. 566; *Glasdir Copper Mines, Ltd.* (1906),

than the debts of which they are representatives.⁴⁷ The main difference between receiver's certificates issued by the receiver of a railway and the receiver of a private corporation is that debts evidenced by railway receiver's certificates may take precedence over lien creditors, in the sale and distribution of the property. In the case of the debts evidenced by receiver's certificates issued by a receiver of a private corporation, they, with few exceptions,⁴⁸ will not take precedence over the debts of lien creditors.⁴⁹

§ 573. Receivers of Quasi-Public Corporations Issuing Receiver's Certificates. Receivers of a quasi public corporation such as electricity producing companies,⁵⁰ have been authorized to issue receiver's certificates and the charge or quasi lien so created against the funds may be prior to mortgage and other liens.

§ 574. Receivers of Street Railways Commonly Issue Receiver's Certificates. Receiver's certificates may be ordered issued by the receiver of a street railway corporation⁵¹ for maintenance and preservation of the railroad, for its repair, the purchase of necessary rolling stock and the payment of taxes.⁵²

§ 575. Liens Created by Receiver's Certificate, if Any. A lien, strictly speaking, can only be created by the contract or acts of the holder or owner of the property or in a broad sense by the sovereignty. A judgment, for instance, creates

C. A. 1 Ch. D. 365; see *International Trust Co. v. Decker Bros.* (1907), 152 Fed. 78, at 83; *Fidelity Ins. Co. v. Roanoke, etc.* (1895), 68 Fed. 623.

⁴⁷ *Fidelity Ins. & S. D. Co. v. Roanoke Iron Co.* (1889), 42 Fed. 377.

⁴⁸ *Porch v. Agnew* (1904), 57 Atl. 547; *Lockport v. Union Box* (1908), 74 N. J. E. 686, 70 Atl. 980; *Hewitt v. Great Western, etc.*, 20 Idaho 235, 118 Pac. 296; *Hewitt v. Walters*

(1911), 21 Idaho 1, 119 Pac. 705, at 707.

⁴⁹ See matter discussed in sec. 576.

⁵⁰ *Central T. & S. Co. v. Chester County Electric Co.* (1911), 9 Del. Ch. 247, 80 Atl. 801.

⁵¹ *Pennsylvania Steel Co., et al., v. New York City Ry. Co.* (1908), 161 Fed. 787.

⁵² *Knickerbocker T. Co. v. O. C. & R. S. Ry. Co.* (1911), 201 N. Y. 379, at 386, 94 N. E. 871.

a general lien over the real estate of the judgment debtor within the county where the judgment is had or otherwise. This is by statute. When a court takes possession of property by its receiver, strictly speaking, an equitable lien does not attach although many cases say that the mere bringing of an equity suit to subject assets of the judgment debtor to the claim of the plaintiff creates an equitable lien.⁵³

When a court takes the property of the defendant in custody through its receiver, it does not get title to the property. It is the duty of the court to preserve that property and at times to realize that property. To do this the court may of necessity empower its receiver to take active measures to preserve or realize the property and to do this it may be necessary to make expenditures of money. If there is no money on hand, the court may order its receiver to borrow money by issuing receiver's certificates and displacing prior liens.⁵⁴ "Buying goods on credit is the equivalent of borrowing money to pay for such goods. There is no legal difference or distinction between an indebtedness for merchandise purchased and one for money borrowed."⁵⁵

The borrower of the money can not strictly have a lien on the property in the custody of the court because the court has not title, neither has the receiver. The borrower can not have a lien by permission of the owner because the court has possession. The borrower can not have a lien by operation of law against the possession of the court unless the sovereign acting through a statute says he shall have, as for instance does the statute of Washington.⁵⁶

⁵³ Cowden v. Wild Goose Mining & Trading Co. (1912), 199 Fed. 561, at 567; see ch. XIX.

⁵⁴ Lockport Felt Co. v. United Box Board & Paper Co. (1908), 74 N. J. Eq. 686, 70 Atl. 980, see 57 Atl. 546.

⁵⁵ Haines v. Buckeye Wheel Co. (1915), 224 Fed. 289, at 294.

⁵⁶ Laws of Washington (1897),

ch. 43, sec. 5. "Whenever a receiver or assignee is appointed for any person, company or corporation, the court shall require such receiver or assignee to pay all claims for which a lien could be filed under this act, before the payment of any other debts or claims other than operating expenses."

The court gives what is a quasi-lien by virtue of its custody of the property and its jurisdiction of the parties. It pledges its own faith to the lender that it will enforce such a lien against the property and the parties as a condition of its releasing the property and of its enforcing any equity in favor of those who invoke its assistance.⁵⁷

§ 576. Power of Court to Create Debts a Charge on Corpus.

(a) Railway Cases. The authority of a court of equity to authorize receiver to create an indebtedness and make it a charge upon the corpus of the estate with priority in payment of said indebtedness over a pre-existing mortgage is generally confined to railway receivership. The justification in thus violating the contractual rights of the mortgagees is stated to be the necessity of the situation, that railway corporations are organized for public purposes with power to condemn private property and they owe a public duty which can only be discharged by the continuous operation of their roads.⁵⁸ It has been decided by the Supreme Court of the United States a number of times⁵⁹ that in the case of a railway, or other public service corporation, because the property is of a public nature and because the public interest requires the operation of the railway or other public service property that the court will authorize the issuance of receiver's certificates to have priority over existing lien creditors.⁶⁰

(b) Private Corporation Cases—When Can Not Issue Certificates. But it has been equally definitely settled that in the case of a private corporation, no such authority or power resides in the courts. "It would be unwise, we think, to extend the power of the court in dealing with property in the hands

⁵⁷ Taft, J., *Mercantile Trust Co. v. Kanawha* (1893), 58 Fed. 6.

⁵⁸ *American Brake Shoe, etc., v. Pere Marquette R. R. Co.* (1913), 205 Fed. 19; *Knickerbocker T. Co. v. O. C. & R. S. Ry. Co.* (1911), 201 N. Y. 379, at 385, 94 N. E. 871.

⁵⁹ *Wallace v. Loomis* (1877), 97 U. S. 146, at 162, 24 L. ed. 895;

Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339; *Kneeland v. American L. Co.*, 136 U. S. 97, 34 L. ed. 379.

⁶⁰ *Knickerbocker T. Co. v. O. C. & R. S. Ry. Co.* (1911), 201 N. Y. 379, at 385, 94 N. E. 871; *In re Clark C. & C. Co.* (1909), 173 Fed. 663.

of receivers to the practical subversion or distinction of vested interests. * * * It is best for all that the integrity of contracts should be strictly guarded and maintained and that a rigid, rather than a liberal, construction of the power of the court to subject property in the hands of receivers to charges, to the prejudice of creditors should be adopted."⁶¹

"A receiver of a private corporation has no such latitude in legal contemplation as it respects the issuance of receiver's certificates as do those of a railroad or public service corporation, and that his authority for displacing mortgage liens, unless by consent of the mortgagee, extends only to the necessary expenditures incident to administering the assets and preserving the property from deterioration pending the winding up of the business and the settlement of the receivership."⁶²

The California Supreme Court upheld the lower court in allowing the receiver of the "California Development Company," assumed by the court to be a private rather than a quasi-public corporation, to issue receiver's certificates. The supreme court further allowed these receiver's certificates to take precedence over prior lienholders, saying that they were issued to carry out the primary object of the appointment, viz.: the care and preservation of the property. A careful reading of the case discloses, however, that the application for

⁶¹ Raht v. Attrill, 106 N. Y. 423, 13 N. E. 282; approved in Hanna v. State Trust Co. (1895), 70 Fed. 2; Farmers L. & T. Co. v. Grape Creek (1892), 50 Fed. 481; Newton v. Eagle, etc. (1896), 76 ed. 418; International Trust Co. v. United Coal Co., 27 Colo. 246; International Trust Co. v. Decker Bros. (1907), 152 Fed. 78; Dalliba v. Winschell, 11 Idaho 364, 82 Pac. 107; In re J. B. & J. M. Cornell Co. (1912), 201 Fed. 381, at 387.

⁶² International Trust Co. v. Decker Bros. (1907), 152 Fed. 78, at 83. See Fidelity Ins. Co. v. Roanoke, etc. (1895), 68 Fed. 623; Mer-

riam v. Victory M. Co. (1900); 37 Or. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997; Investment Corp. v. Hospital (1900), 40 Or. 523, 64 Pac. 644; International T. Co. v. United Coal Co. (1901), 27 Colo. 246, 60 Pac. 621; Cowden v. Wild Goose Mining & Trading Co. (1912), 199 Fed. 561, at 567; Union Trust Co. v. Southern S. & L. Co. (1908), 166 Fed. 193, at 197; Kneeland v. American Loan Co., 136 U. S. 89, at 97, 98, 34 L. ed. 397; Southern Ry. v. Carnegie Steel Co., 176 U. S. 257, at 263; 44 L. ed. 458; Bernard v. Union Trust Co. (1908), 159 Fed. 620, at 622.

a receiver was filed by the trustee of bondholders. The bondholder who intervened was a beneficiary of the trust and was bound by the acts of the trustee.

The Circuit Court of Appeals for the Eighth Circuit in *Hanna v. State Trust Co.*, 70 Fed. 5, 16 C. C. A. 586, 30 L. R. A. 201, has expressly declared that the court could not, against the objections of the first mortgagees, displace their liens by the issue of certificates to carry on the business of a corporation whose business was of a private nature.⁶³ This doctrine applies to railway corporations which are private and do not do a public business or act as common carriers.⁶⁴ However, if in a receivership of a private corporation the mortgage or other lienholders consent to the issuing of receiver's certificates such consent will postpone his lien to the certificate holder's lien. This doctrine not permitting lien on corpus of property, as applied to private corporations, has been applied to irrigation companies. Even at the instance of the State Public Service Commission, a court has no jurisdiction to order its receiver to issue receiver's certificates and to proceed with the work at the instance of the lienholders.⁶⁵

(c) Private Corporation Cases—When Can Issue Certificates.

As against the proposition that receiver's certificates can be issued displacing lien on the corpus of the property only in railway cases, we have a few scattered cases.

⁶³ *Newell v. International, etc.* (1909), 169 Fed. 497, 152 Fed. 78, at 87; *Union Trust v. Southern S. & L. Co.* (1908), 166 Fed. 193; *Bernard v. Union Trust Co.* (1908), 159 Fed. 622; *Wood v. Guarantee T. Co.*, 128 U. S. 421, 32 L. ed. 472.

In a recent case, viz., *B. Borchardt Co. v. Yaryan Naval Stores Co.* (1913), 206 Fed. 366, *Speer, J.*, of the United States District Court, Southern District of Georgia, stretched the rule and permitted the receiver to issue receiver's certificates against the protest of one small creditor when eighty-five per cent. of the creditors joined in the

request for such issuing of certificates, the court believing it was manifestly to the interest of all parties before the court that they be issued. The court said that the small creditor had a right to object and ordered the receiver to pay this objecting creditor his claim.

⁶⁴ *Doe v. Northneyten Coal & T. Co.* (1896), 78 Fed. 73.

⁶⁵ *Farmers Loan, etc., v. Burbank, etc.* (1912), 196 Fed. 539; see *Biber-White Co. v. White River Val. Elec. Co.* (1902), 115 Fed. 786, at 790. See *Atlantic T. Co. v. Chapman*, 208 U. S. 360, 52 L. ed. 528.

It is held, for instance, that pending an appeal from an order denying the confirmation of a receiver's sale of property consisting of a large frame building and equipment, the issuing of receiver's certificates for expenses incident to the preservation of the property will be permitted, where the company owing it is insolvent, the income is insufficient and no reason appears for charging such expenses to the persons challenging such sale.⁶⁶

Another case is that of *Lockport Felt Co. v. United Box Board & Paper Co.*⁶⁷ The opinions in these two cases must be confined to the facts therein stated. It is undoubtedly true that costs of realization may be assessed against lienholders in a sale under a receivership on the theory that the receiver has performed the act which the lienholder might otherwise have to perform and pay for himself. Expenses of preservation when not used in too broad a sense being for the preservation of the property pledged, may also in exceptional cases be taken out of the lienholder's property. But such preservation should be confined to insurance, watchman and the like and not extended "to running a business."

The costs of realization and preservation,⁶⁸ as used in a limited sense, are generally taken out of the funds realized from a sale of the property and paid upon a distribution made under order of the court appointing the receiver. In most cases it is unnecessary to pay them before such distribution. If, however, the court has power to order such expenses paid prior to distribution to the lien creditors, it must follow that the court can order the receiver to borrow money to pay them and issue a certificate of indebtedness to the lender.⁶⁹

⁶⁶ *Porch v. Agnew Co.* (1904), 57 Atl. 547; reviewed in 70 N. J. E. 328, 61 Atl. 721; Court of Chancery of New Jersey, March 31, 1904.

⁶⁷ Court of Chancery, New Jersey, October 16, 1908, reported in 70 Atl. Rep. 980, 74 N. J. Eq. 686. See *Ellis v. Waters Co.* (1893), 86 Tex. 112, 23 S. W. 858; *McLane v. Railway*, 66 Cal. 606, 6 Pac. 748; *Meyer v. Johnson*, 53 Ala. 237; *Kampmann*

v. Sullivan & Co. (1901), 26 Tex. Civ. App. 308, 63 S. W. 173. See paragraph, "Costs of Realization and Preservation."

⁶⁸ See secs. 833 and 834, *infra*, "Costs of Realization and Preservation."

⁶⁹ *Horton v. Thomas McNally Co.* (1915), 151 N. Y. S. 674, 89 Misc. (N.Y.) 165. See *Pusey & Jones v. Pennsylvania* (1909), 173 Fed. 634.

§ 577. Administration Expense Ahead of Receiver's Certificates. People who buy receiver's certificates are held to do so with the knowledge that the receivership property and assets are subject in the first instance to the payment of administration expenses including fees of counsel, expenses of an intermediate and final accounting and commissions due the receiver, and that the certificates can only share in the fund that may be left after the payment of such expenses. And such doctrine has been applied to the receivership of a manufacturing concern. Says Jenkins, J.: "It is not presumable that the court would divest itself of the power to pay the expenses of operation which it had assumed. That would be an act of *felo de se*." ⁷⁰

§ 578. Proceedings Necessary to Issue Receiver's Certificates. The power to order an issue of receiver's certificates should be exercised with the utmost caution, prudence and reserve and never without giving those whose interests are to be affected the opportunity to be heard in opposition to it. ⁷¹ This caution and notice is based on the fundamental and elemental principle of our law that, "no man can rightly be deprived of his property or any security or lien which he may have acquired, except by his own consent, or his own negligence or default, or by proceedings had in accordance with the law of the land—that is to say, the opportunity to be heard in defense of his rights." ⁷² It is not necessary to the exercise of the power to issue receiver's certificates in a railroad receivership, which may disturb existing liens that the security holders whose liens are postponed be, by the bill, made defendants or otherwise brought in as parties to the

⁷⁰ *Anderson v. Condit* (1899), 93 Fed. 349, at 353.

⁷¹ *Kain v. Rorer* (1890), 86 Va. 754; *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895; *Knickerbocker*

T. Co. v. O. C. & R. S. Ry. Co. (1911), 201 N. Y. 379, at 383, 94 N. E. 871.

⁷² *Osborne v. Big Stone Gap Colliery* (1898), 96 Va. 67, 30 S. E. 446.

creditor's suit, but no order finally affecting liens should be made without giving to the holder of the affected lien adequate opportunity to be heard. It is not ordinarily fatal to the validity of an order to issue receiver's certificates that the complainant lienholder was not heard before the order originally passed. It is sufficient that he was given opportunity to be heard before the order became practically effective.⁷³ The crucial questions in such cases are: First, Whether the circumstances necessitated (for the purpose of conserving and operating the railroad property), the borrowing of money for making the purchases and payments provided for by the order and second, securing the money so borrowed in the way so provided.⁷⁴

Before receiver's certificates are ordered to be issued, there should be a full hearing on the petition presented after due notice to all persons interested, and the court when ordering certificates issued should limit the amount of certificates to that sum which would be necessary to conserve the estate in its hands.⁷⁵

§ 579. Proceedings Necessary to Collect Receiver's Certificates. "Now it (the court) may enforce the lien in one of two ways: It may directly order out of the proceeds of sale the prior payment of the loans, or it may impose a continuing lien on the property by providing in its decree for sale that the purchasers shall take it subject to such a lien. If the latter method is followed then a lien is established by contract with the purchaser in favor of the lender which appearing in the chain of title by which the purchaser holds, is attached to the property in the hands of all subsequent grantees of the purchaser, and may of course, be enforced by the lender in an independent action. *Swan v. Clark*, 110 U. S. 602, 4 Sup. Ct.

⁷³ *Union T. Co. v. Illinois Midland R. R.*, 117 U. S. 434, at 459, 29 L. ed. 963; *American Brake Shoe, etc., v. Pere Marquette R. R.* (1913), 205 Fed. 19.

⁷⁴ *American Brake Shoe & T. Co. v. Pere Marquette R. R.* (1913), 205 Fed. 14, at 19.

⁷⁵ *Illinois Steel Co. v. Ramsay* (1910), 176 Fed. 853.

Rep. 241. But the court may order the sale of the property free of all liens in which case the purchaser takes a title freed from the burden as well of receiver's loans as of mortgage debts, and the pledge of the court that the receiver's debts shall constitute a paramount lien can only be fulfilled by the court in the distribution of the proceeds of sale."⁷⁶

§ 580. Interest on Receiver's Certificates. A court of equity can not allow a usurious rate of interest, that is, a rate higher than that allowed by the law of the state.⁷⁷ The Supreme Court of Idaho said: "We do not think it wise or expedient to authorize receiver's certificates to draw a greater rate of interest than the statutory rates allowed on judgments and decrees of courts, and this should be especially observed in cases where such certificates are to take precedence over mortgages, judgments and other liens and incumbrances existing at the time that the receivership proceedings are instituted."⁷⁸

§ 581. Assignment of Receiver's Certificates. Though a receiver's certificate is not a share of stock it may be assigned in the same manner and the assignment may be made with the same effect as to change of ownership.⁷⁹ This does not mean, however, that the receiver's certificate is negotiable in the manner of the law merchant for the certificate in the hands of the assignee is subject to all equities existing against the certificate itself, that is, to all equities against the original holder or in favor of the maker.

By signing a transfer and power of attorney in blank in the back of a receiver's certificate and delivering the certificate so endorsed, the transferor clothes the transferee with the customary indicia of absolute ownership.⁸⁰

⁷⁶ Taft, J., *Mercantile Trust v. Kanawha* (1893), 58 Fed. 6.

⁷⁷ *Meyer v. Johnston*, 53 Ala. 237; *Hewett v. Walters* (1911), 119 Pac. 705, 21 Idaho 1.

⁷⁸ *Hewett v. Walters* (1911), 119 Pac. 705, at 708, 21 Idaho 1. See

Pennsylvania Steel Co. v. New York City Ry. Co. (1908), 163 Fed. 242, at 246.

⁷⁹ *McCarthy v. Crawford* (1909), 238 Ill. 38, at 47, 86 N. E. 750.

⁸⁰ *McCarthy v. Crawford* (1909), 238 Ill. 38, at 47, 86 N. E. 750.

§ 582. Receiver's Notes and Bonds. Besides authorizing receivers to issue receiver's certificates they are at times authorized to issue notes⁸¹ or bonds.⁸² They are not strictly negotiable instruments any more than receiver's certificates are strictly negotiable, because there is no certainty as to the payor. Such notes, bonds and receiver's certificates are evidences of debt. They have some characteristics of negotiable instruments but they are in fact just what they purport to be, obligations of receivers and managers as such.⁸³

Bona fide holders for value of receiver's notes and bonds⁸⁴ are put on inquiry as to the litigation, in the course of which the obligations were issued both as to prior and subsequent proceedings therein.⁸⁵

§ 583. Effect of State Statutes on Receiver's Certificates under State Practice. See subject discussed under ch. XXXV, vol. II, "Statutes Affecting Receivership."

§ 584. Effect of State Statutes on Receiver's Certificates, under Federal Practice. See subject discussed under ch. XXXV, "Statutes Affecting Receivership."

⁸¹ Peoples Savings Bank, etc., v. Rogers (1910), 177 Fed. 386; Zielian v. Baltimore Plate Ice Co. (1911), 81 Atl. 22, 115 Md. 658.

⁸² Smythe v. Central Vermont Ry. Co. (1914), 90 Atl. 901, 88 Vt. 59.

⁸³ Smythe v. Central Vermont Ry. Co. (1914), 90 Atl. 901, 88 Vt. 59; Union Trust Co. v. Chicago R. Co., 7 Fed. 513, cases cited; Union Trust Co. v. Illinois Midland Co. (1885), 117 U. S. 434, 29 L. ed. 963; Turner

v. Railway (1880), 95 Ill. 134; Langdon v. Railroad Co., 53 Vt. 222, at 272.

⁸⁴ Northern Pac. v. Boyd (1912), 228 U. S. 482; Smyth v. Central Vt. Ry. (1914), 90 Atl. 901, at 906, 88 Vt. 59.

⁸⁵ Smyth v. Central Vt. Ry. (1914), 90 Atl. 901, at 906, 88 Vt. 59; Mercantile Trust Co. v. Kanawha & O. Ry. Co. (1893), 58 Fed. 6.

CHAPTER XXIV

RECEIVER'S SALES

ANALYSIS

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§ 585. Power of a Court of Equity to Sell Property. A court of equity acts in personam and not in rem. In a strict sense a proceeding in rem is one taken directly against the property and has for its object the disposition of the property without reference to the title of the individual claimants.¹ As an example of such proceedings strictly in rem may be mentioned, libels against a vessel or libels against food or liquor, by the government.

In a larger and more general sense the term proceeding in rem is applied to actions between parties where the direct object is to reach and dispose of property owned by them, or

¹ *Pennoyer v. Neff* (1877), 95 U. S. 254, 24 L. ed. 565; *Howard* (1912), 229 U. S. 254, 261, 57 L. ed. 1174.

of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the state, they are substantially proceedings in rem in the broader sense.² The Supreme Court of the United States has said a receiver's employees "must look to the property in the custody of the court and its income for their compensation."³ Such a statement is almost equivalent to a holding by the court that the appointment of a receiver over the property is a seizure of the property by the court like a seizure of a vessel in a libel suit against it. However, no court as yet has been bold enough to hold flatly that a court of equity when appointing a receiver seizes the property and thus divests the title of all former owners whoever they may be, as is the case in a pure proceeding in rem.⁴

Under the present state of the law, a court of equity when appointing a receiver acts mediately and not immediately on the property in possession or owned by the defendant.

A court of equity may compel persons domiciled within its limits to transfer title to property so far as such formalities can be complied with whether the property be located within the court's jurisdiction or without.⁵ The exercise of this jurisdiction, however, in no manner interferes with the supreme control over the property by the state within which it is situated.⁶ If the party fails to obey the court, he may be punished, yet the court itself by making a decree can not except by the assistance of a statute,⁷ pass or establish a legal

² *Pennoyer v. Neff* (1877), 95 U. S. 734, 24 L. ed. 565.

³ *Atlantic Trust Co. v. Chapman* (1907), 208 U. S. 377, 52 L. ed. 528.

⁴ *Woodruff v. Taylor* (1847), 20 Vt. 63; see *Pilloid v. Angola Ry. & Power Co.* (1910), 91 N. E. 829, 46 Ind. App. 719.

⁵ *Pennoyer v. Neff* (1877), 95 U. S. 723, 24 L. ed. 565.

⁶ *Penn v. Lord Baltimore* (1750), 1 Ves. 82; *Massie v. Watts* (1810), 6 Cranch 148, 3 L. ed. 181; *Watkins v. Holman* (1842), 16 Pet. 25, 10 L. ed. 873; *Corbett v. Nutt* (1870), 10 Wall. 464, 19 L. ed. 976.

⁷ *Felch v. Hooper* (1875), 119 Mass. 52, at 57; *Jelke v. Goldsmith* (1895), 52 O. S. 512, 40 N. E. 167; *Hart v. Samson* (1893), 110 U. S.

title to the property,* even if the property be located within its jurisdiction. With or without a statute a court in one state can not make a decree affecting directly or mediately the title to property in another state or sovereignty.

Some states provide by statute that a judgment or decree of a court of competent jurisdiction when it orders a conveyance or transfer of title shall itself act as a transfer of that title. Thus the sovereignty which has supreme control over the property within its limits, may say that a title to property shall pass by a decree of a court of equity.

If a court of equity orders a party subject to the court's jurisdiction to make a transfer and such party refuses, the court can order its officer, a marshal, sheriff, commissioner, master, receiver,⁹ or other officer to make a deed to the proposed transferee. A court of equity has inherent power to cause the execution of its own orders and decrees and to appoint a special master to sell specific real estate.¹⁰ If the transferee is a party to the suit, he is thereby under the jurisdiction of the court and subject to its orders in the cause then pending. If he is not a party to the suit and makes a bid for the property at a judicial sale, he by making the bid becomes a party to the cause and subject to the jurisdiction of the court.¹¹

How does the court, however, through its officers either transfer or sell the property, when neither the court nor its officer has legal title?

A legal title is transferred under common law by deed or gift, of the owner or by transfer of seizin. Neither a court of equity nor its officer can do this because neither the court nor its officer has actual seizin of the property.

151, at 155, 28 L. ed. 101; *Carpenter v. Strangé* (1890), 141 U. S. 87, at 105, 35 L. ed. 640; *Ager v. Murray* (1881), 105 U. S. 130, 26 L. ed. 942.

* *Hart v. Samson* (1883), 110 U. S. 151, at 155, 28 L. ed. 101.

⁹ *Pilliod v. Angola Ry. & Power*

Co. (1910), 91 N. E. 829, 46 Ind. App. 719.

¹⁰ *Mayer v. Wick* (1864), 15 O. S. 548. See *State, ex rel., v. Shelton* (1911), 238 Mo. 281, at 295, 142 S. W. 417.

¹¹ *Deaderich v. Smith* (1845), 6 Humph. 146.

However, a court of equity having jurisdiction of the parties to the suit and having the subject-matter within its jurisdiction, makes a decree that the title of the property is in one of the parties, or confirms a sale of the property and makes a decree that the title of the property is in the purchaser who has by bidding become a party to the suit. The court in thus making its decree enjoins all other parties to the cause from interfering with the possession and quiet enjoyment of the transferee or purchaser.

If anyone not a party to the suit interferes or threatens to interfere, he can not well be directly subject to such injunctions because he was not properly before the court. But the transferee or purchaser can go into a proper court and bring proceedings against such a person setting up the decree in equity as evidence of ownership. A suit in equity in personam only binds the parties to it, therefore the party interfering might show a better title than the transferee or purchaser from the court, and if so, he might prevail.

After the court has confirmed the sale it orders the marshal, master, sheriff, receiver¹² or other officer of the court to make a deed to the transferee or purchaser. This deed is little more than a record of the court proceedings and when properly recorded becomes notice of such proceedings and of the change of ownership. Statutes frequently declare that a deed by an officer of the court shall be prima facie evidence of the legality and regularity of the sale, etc.¹³

Thus a court of equity acting in personam transfers title by a process of injunction and acts mediately not immediately on property.

§ 586. Power of a Court of Equity to Sell Personalty. It is said that a receiver never takes possession of real estate but he collects the rents and profits of real estate. A receiver does, however, take possession of tangible personal property,

¹² Quincy, etc., Ry. v. Humphreys
(1891), 145 U. S. 98, 36 L. ed. 632.

¹³ Ohio General Code (1910), sec.
11694 (R. S., sec. 5402).

such as money, a stock in trade of merchandise, machinery and equipment of a factory, rolling stock of a railroad, etc.

When the court has the actual possession of tangible property, it may sell it, but since a court of equity acts in personam such possession by the court or the court's receiver not being by reason of a suit in rem, or of a seizure like the seizure in a libel suit, but by reason of a suit in personam, does not give the court such a title to the property that the court can sell it, and so cut off a person's right to the property who was not present in court constructively or otherwise and did not have his day in court to assert his right to the property. A proceeding against a vessel under libel proceedings or against food or liquor under libel proceedings by the government forfeits the property to the government and the title of the original owner is divested.¹⁴ The government having the title sells the property divested of any and all claims by anyone. Not so a sale by a court of equity in an action in personam. A sale by a court of equity does not divest rights of those having a claim and who are not properly before the court either constructively or otherwise.

A court of equity, however, in an action in personam acts mediately on the property of parties before the court. A court of equity may order a party before the court to deliver up personal property to the receiver, in default of such delivery the court may proceed against the party for failure to obey the court. If the party continues to refuse, the court can send its officer out and forcibly take the property from the possession of the party, provided the property is within the local territorial jurisdiction of the court, or provided it is within the state and the court either by the constitution or by statute has power to send its own officer or command a local county officer to act for such court in another county or local division of the state.

¹⁴ Woodruff v. Taylor (1847), 20 Vt. 63, at 71.

If the party is outside of the state, of course, the court can not force him to act and if the property is outside of the state, the court can not send its officer to enforce an order concerning it.

Therefore a court of equity may sell personal property within its local jurisdiction and within the state so long as it has power to send its own officer or send an order to a local officer to enforce its order within the state.

As a general rule, personal property has no locality, but follows, as to its disposition and transfer, the law of the domicile of the owner. Hence, a voluntary conveyance, valid according to the laws of the state where the owner resides, will in general, operate to transfer such property wherever it may be situated, whilst a conveyance by operation of law acts in invitum, and can affect only such property as is actually situated within the territory or county where the law can forceably act. The law of a state has no force *proprio vigore* beyond its territorial limits.¹⁵

A receiver appointed in one state for an insolvent corporation has no title as such to property located in another state, and not actually in his possession.¹⁶ This is because he is appointed by a court which derives its jurisdiction from state laws, which have *ex proprio vigore* no extraterritorial force and the effect of which in other states depends wholly on the comity of the state in which the application is invoked. But by the courtesy extended by the several states of the Union to one another, not only from motives of respect but from consideration of mutual convenience, the right of a receiver to possess himself of assets, located in a state other than that of his appointment is frequently recognized and enforced, subject to qualifications.¹⁷

¹⁵ Kelly v. Crapo (1871), 45 N. Y. 90; Story on Conflict, secs. 410, 411.

¹⁶ Wharton, Conflict of Laws, sec. 390.

¹⁷ Sands v. E. S. Greeley & Co. (1898), 88 Fed. 132.

When property in another state has actually been reduced to possession, the receiver can stand upon his possessory title, and defend his rights against all others who can not prove a better title. It is only when he is compelled to resort to the court to obtain possession of assets that he must rely upon that principle of comity upon which alone his title rests.¹⁸

A court of the United States may sell a railroad, even if part of its property is located outside of the circuit, when such court has jurisdiction of the trustee of the mortgage covering the railroad.¹⁹

There is one important distinction between the selling of personalty and real estate by a court of equity. When the tentative sale of personalty by the officer of the court is confirmed by the court, the title passes.²⁰ With real estate the title does not pass until the officer of the court gives a deed as directed by the court.

§ 587. Power of a Court of Equity to Sell Real Estate. The power of the state to regulate the tenor of real property within her limits and the modes of its acquisition and transfer is undoubted. The power of the state in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the federal government.²¹ The federal government and the various states have created their judiciaries and given by special grant or by implication certain courts chancery or equity powers to appoint and to control receivers and the property placed in their hands. One of the chancery or equity powers is to order a sale of the object of the litigation wherein such a measure becomes necessary to preserve the interests of the parties.²²

¹⁸ *Sands v. E. S. Greeley & Co.* (1898), 88 Fed. 132.

¹⁹ *Muller v. Dows* (1876), 94 U. S. 449, 24 L. ed. 76.

²⁰ *Northern Brewery Co. v. Princess Hotel* (1915), 78 Or. 453, 153 Pac. 37.

²¹ *United States v. Fox* (1876), 94 U. S. 315, at 320, 24 L. ed. 192; also *Arndt v. Griggs* (1889), 134 U. S. 316, at 321, 33 L. ed. 918, and cases cited.

²² *Crane v. Ford* (1824), *Hopkins* (N. Y.) 114.

Of the power of the court to make an order of sale by a receiver appointed by the court in a proper case, there is no doubt,²³ if that be deemed necessary for the benefit of the parties concerned.²⁴

When a contract has been violated where indebtedness has accrued and where injury has been done by which a liability has been created, the law will lay its hands by suit on the property of the person who is indebted,²⁵ or who is liable to the civil action when such property is within the territorial limit of the state and subject it to the payment of the indebtedness of the owner.

§ 588. Power of Administrative Receiver to Sell Property.

A receiver may be appointed merely to administer under Louisiana law or preserve property. A sale of the property under such a receivership order may not be originally contemplated. It is possible for the court appointing a receiver to enlarge his powers from time to time. The effect of an order to a receiver to sell property is an enlargement of his powers.²⁶

§ 589. Courts of Equity Act Mediatly, Not Immediately, on Land. It is fundamental that equity acts in personam and not in rem. If this is so, a court of equity can not affect land or other property directly, but it can affect land and other property mediatly, that is, by making an order upon a person subject.

A court of chancery does not assume any title to the land,²⁷ neither has the receiver any title to the land unless some special statute gives him title. When the receiver sells property, the court is the vendor.

²³ First Nat. Bank v. Shedd (1886), 121 U. S. 74, at 87, 30 L. ed. 877.

²⁴ Quincy, etc., v. Humphries (1891), 145 U. S. 98, 36 L. ed. 632.

²⁵ Brown on Jurisdiction, sec. 58; also Lessee of Avery v. Pugh (1839), 9 Ohio 67, at 69.

²⁶ American Trust Co. v. Crescent Ice Co. (1913), 133 La. 247, 92 So. 664, under Louisiana law regarding receivers, 1898, act No. 159.

²⁷ Evans v. Matthias (1857), 7 E. & B. 602.

Courts of chancery act in personam and direct their decrees only in personam. They can not therefore act on land immediately but act on land and other property mediately through persons. Courts of equity affect title and even transfer title by:

First. Requiring the parties in whom the legal or equitable interest may be to convey for those found to be beneficially interested.²⁸

Second. Make a decree finding that the title is transferred from the original owner to a third party, which decree in itself does not transfer the legal title. By statute, however, this decree may transfer the title.

Third. Require a master, receiver or other officer of the court to find a purchaser and report a sale. The court confirms the report and sale and orders the master, receiver or other officer to make a deed to the purchaser. This deed can not, strictly speaking, transfer the legal title, because neither the court nor its officer ever had the legal title nor seizin, but the court transfers the title by a process of injunction.

Furthermore, the court or another court acting on the first court's decree, will protect the purchasers.

Courts of equity may act on lands outside of their jurisdiction, not immediately, but mediately; that is, by compelling the defendant to do some act concerning those lands, as for instance, execute a deed to the receiver, or to someone else,²⁹ and may enforce the decree by process against the defendant.³⁰

Courts of equity can not even act on lands within their territory immediately and convert an action in personam into an action in rem unless there is some statute permitting such a practice.

²⁸ *Evans v. Matthias* (1857), 7 E. & B. 602.

²⁹ *Carpenter v. Strange* (1890), 141 U. S. 106, 35 L. ed. 640; *Pennoyer v. Neff* (1877), 95 U. S. 723, 24 L. ed. 565.

³⁰ *Watkins v. Holman* (1842), 16 Pet. 25, at 56, 10 L. ed. 873; *Pennoyer v. Neff* (1877), 95 U. S. 723, 24 L. ed. 565.

Judgments and decrees are binding only upon parties and their privies. Neither courts of equity nor common-law courts can deprive a man of his property, or of his rights by the judgment or decree of a court, without an opportunity being given him of defending the right. Thus opportunity is afforded, or supposed in law to be afforded, by a citation or notice to appear, actually served; or constructively, by pursuing such means as the law may, in special cases regard as equivalent to personal service. The course of proceeding in admiralty causes and some other cases where the proceeding is strictly in rem, may be supposed to be exceptions to this rule. They are not properly exceptions; the law regards the seizure of the thing as constructive notice to the whole world, and all persons concerned in interest are considered affected by this constructive notice. But if these cases do form an exception, the exception is confined to cases of the class already noticed where the proceedings are strictly and properly in rem, and in which the thing condemned is first seized and taken into the custody of the court. A decree in chancery for the conveyance of land has never yet been held to come within the principle of proceedings in rem so far as to dispense with the service of process on the party.³¹

The appointment of a receiver by a court of equity is not such a seizure of the land or other property as would convert the proceeding in which the receiver is appointed into a proceeding in rem.^{31a} A receiver except by statute does not get title, he is but a caretaker.

Neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the courts.³²

³¹ Hollingsworth v. Barbour (1830), 4 Pet. 466, at 475, 7 L. ed. 922.

^{31a} See leaning of the court towards declaring a receivership is a proceeding in rem in *Atlantic Trust*

Co. v. Chapman (1907), 208 U. S. 360, at 375, 52 L. ed. 528.

³² *Watkins v. Holman* (1842), 16 Pet. 25, at 56, 10 L. ed. 873; *Farmers L. & T. Co. v. Postal* (1887), 55 Conn. 335.

§ 590. Distinction between Decrees in Personam and in Rem.

A judgment in rem is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having the subject-matter under its immediate control and having competent authority to adjudicate on the status of such subject-matter. A judgment in rem is founded on a proceeding instituted not against the person as such, but against or upon the thing or subject-matter itself whose state, or condition is to be determined.³³ Authority to adjudicate on the status of the thing or to sell or distribute the thing is founded primarily upon the seizure of the thing itself by the court and secondarily upon theoretical notice being given to all the world that the court is going to adjudicate concerning the thing. "It is by no means certain, that all persons having an interest in the property have actual notice of the proceedings; but if the thing itself, upon which the proceeding is had, be within the jurisdiction of the court, all persons interested are held to have constructive notice; and the sentence, or decree of the court, declaring the state, or condition of the property, is held to be conclusive upon all the world." ³⁴

"The object and purpose of a proceeding purely in rem is to ascertain the right of every possible claimant and it is instituted in an allegation that the title of the former owner, whoever he may be, has become divested, and notice of the proceedings is given to the whole world to appear and make claim to it." ³⁵

(a) Pure Proceedings in Rem. Examples of pure proceedings in rem are the probate of a will. "The proceeding is, in form and substance upon the will itself. No process is not issued against anyone; but all persons interested in determining the state or condition of the instrument are constructively notified by a newspaper publication, to appear and contest the probate;

³³ Woodruff v. Taylor (1847), 20 Vt. 63.

³⁴ Woodruff v. Taylor (1847), 20 Vt. 63, at 71.

³⁵ Woodruff v. Taylor (1847), 20 Vt. 63, at 71.

and the judgment is, not that this or that person shall pay a sum of money or do a particular act, but that the instrument is, or is not, the will of the testator." ³⁶

Proceedings in rem may be had against personal property, as for instance, a libel against a ship, or a libel by the federal government against food articles for an alleged violation of the pure food law.

"A sale of the property under such proceedings in rem. passes the title absolutely and farther in the case of judgments of courts of admiralty; they are also held to be conclusive evidence of the facts stated in the decree to have been found by the court as the basis of the decree." ³⁷

(b) Quasi-Proceedings in Rem. There is a class of cases which may be considered to some extent proceedings in rem, though in form they are proceedings inter partes. For instance, an attachment of property, where the court has jurisdiction of the property, but not of the person of the defendant, and a sale of it (or a levy upon it, if it be real estate) on execution, is in the nature of a proceeding in rem. The judgment would be binding as between the parties so far as regarded the property as a proceeding in rem. The status of the property as between the plaintiff and defendant would be held to have been determined by the proceedings. But the proceeding would not in any way affect the status of the property as to any other persons than the parties to the record and those claiming by them. ³⁸

Other examples of quasi proceedings in rem or actions in the nature of proceedings in rem are actions instituted to partition real estate, foreclose a mortgage or enforce a lien. So far as they affect property in the state, they are substantially proceedings in rem in the broader sense which we have mentioned. ³⁹

³⁶ Woodruff v. Taylor (1847), 20 Vt. 63, at 71.

³⁷ Woodruff v. Taylor (1847), 20 Vt. 63, at 71.

³⁸ Woodruff v. Taylor (1847), 20 Vt. 63, at 71.

³⁹ Pennoyer v. Neff (1877), 95 U. S. 734, 24 L. ed. 565; Heidritter v. Elizabeth, etc. (1884), 112 U. S. 294, at 301, 28 L. ed. 729.

§ 591. Receiver's Sale a Judicial Sale. A judicial sale is one made by a court having jurisdiction over the proceedings and having the property under its control, made by its clearly authorized officer on the order of the court *pendente lite* and approved or confirmed by it.⁴⁰ The sale is either actually or constructively in the court and the court is the vendor. Such a sale is not valid or binding and confers no right to the property sought to be sold until confirmed by the court.⁴¹ By such confirmation it is judicially made the act of the court and by this act it becomes and is a judicial sale.⁴² A sale by a court through its receiver is therefore a judicial sale.⁴³ The receiver acts in his official capacity precisely as does a sheriff or a commissioner.⁴⁴ The master and receiver are representatives of a court of equity as a marshal or sheriff is representative of a court of law.⁴⁵

It has been held in Texas that an order of sale issuing to the sheriff or any constable of the county where the property is situated is error by such court issuing such order; that the order of court appointing the receiver placed the property in the custody of the law and it must be sold by the receiver under the orders of the court.⁴⁶

§ 592. Distinction between Judicial Sale and Ordinary Sale on Execution. In making ordinary execution sales simply by virtue of his office, the sheriff or marshal acts as the ministerial

⁴⁰ Brown on Jurisdiction, sec. 65.

⁴¹ Northern Brewery Co. v. Princess Hotel (1915), 78 Or. 453, 153 Pac. 37, at 40.

⁴² Rorer on Judicial Sales, sec. 2; Dresbach v. Stein (1884), 41 O. S. 70.

⁴³ Harned v. Beacon Hill, etc. (1911), 9 Del. Ch. 232, 80 Atl. 805; Cressler v. Tri-State Loan & Trust Co. (1914), 182 Ind. 572, 107 N. E. 68; Rice v. Ahlman (1912), 70 Wash. 12, 126 Pac. 66; Lawson v. DeBolt, 78 Ind. 563; Staser v. Gaar

(1906), 39 Ind. App. 696, 78 N. E. 987.

⁴⁴ Pilliod v. Angola Ry. & Power Co. (1910), 46 Ind. App. 719, 91 N. E. 829.

⁴⁵ Pewabic Min. Co. v. Mason (1891), 145 U. S. 349, at 362, 36 L. ed. 732.

⁴⁶ Wharton v. Washington County State Bank (1913), Tex. Civ. App. 153 S. W. 699, citing Texas Trunk Ry. v. Lewis, 81 Tex. 8, 16 S. W. 64; Riesner v. Railway Co., 89 Tex. 658, 36 S. W. 53.

officer of the law, not as the organ of the court. He is not its instrument or officer, as in judicial sales, and the court is not the vendor. His authority to sell rests in the law and on the writ and does not as in judicial sales emanate from the court. The functions of the court terminate at the rendition of the judgment, except where the confirmation of the sale is the practice, as it is in some states in the case of sales on execution. The court ordinarily in sales on execution does not direct what shall be levied or sold, or how the sale shall be made. The law is the officer's guide.⁴⁷

In some states, sheriffs' deeds selling property on execution have to be confirmed by the court, therefore such sheriffs' sales in such states are judicial sales.⁴⁸

The case of a special master in chancery appointed to make sale of certain property under a decree in a suit in equity is not that of an officer selling on execution. In such a case (special master in chancery) the court can change or modify the decree at any time before it is carried into effect and after it is carried into effect can confirm or ratify the doings of the agency, as in the case of receivers and other agencies, if they have departed from or exceeded the authority conferred upon them, provided the rights of parties interested have not been prejudiced or affected injuriously thereby.⁴⁹

§ 593. Receiver's Sale of Property within Court's Local Jurisdiction. When a court of equity orders property in its custody to be sold the court itself as the vendor confirms the title in the purchaser. Neither the court nor its officer, whether master or receiver, or other officer, gives a legal title to the purchaser because neither the court nor its officer has a legal title to give unless the owner has made a deed to the officer of the court. A court of equity acts in personam and therefore by a process of injunction against the owner and

⁴⁷ Rorer, Judicial Sales, sec. 46.

⁴⁸ Ohio General Code, sec. 5398.

⁴⁹ *Old Colony v. Great West. St. Co.* (1902), 181 Mass. 413, 63 N. E. 945.

against the parties to the suit protects the purchaser against interference and assures him a quiet title and quiet enjoyment.⁵⁰

If one not a party to the suit who has not a valid claim in the title interferes with the possession of the purchaser, he, the purchaser, being in possession rightfully, can bring a suit to quiet title or other proper proceeding. If someone had a valid claim against the property before the receivership proceedings were had, the receivership proceedings can not cut off his claim unless he has had his day in court by proper notice, either actually or by publication under proper statutes. Such a person having a valid claim can assert it by ejectment or otherwise against the purchasers from the receiver.

The decree of a court of equity decreeing the title in the purchaser settles the rights in the property of all parties to the suit and their privies. When the decree is once rendered judgment upon the same may be enforced by execution not only in the county where rendered, but elsewhere throughout most states.⁵¹

A court of equity, however, when it has through its officer sold property within its local jurisdiction may besides enjoining the parties to the suit and before the court from interfering with the possession and quiet enjoyment of the purchaser, issue a writ of assistance or a writ of possession and put the purchaser in possession. Whether a local court can do this when the property lies within the state or sovereignty, but without the court's, county or local jurisdiction will be discussed under title and sec. 594, *infra*.

§ 594. Receiver's Sale of Property within State. When a receiver is appointed by the local equity court of one county, it may well be asked, has such court power to make a valid

⁵⁰ *In re Lennon* (1897), 168 U. S. 548, 41 L. ed. 1110.

⁵¹ *Hart v. Sansom* (1883), 110 U. S. 154, 28 L. ed. 101; *Massie v.*

Watts (1810), 6 Cranch 148, 3 L. ed. 181; *Langdell's Eq. Pl.* (2d Ed.), secs. 43, 184; *Orton v. Smith*, 18 How. 263, 15 L. ed. 393.

order of sale covering property of the defendant situate in another district of the state?

It must first be ascertained whether or not the main action upon which the receivership has been predicated has been rightly brought in the proper county⁵² or district.

It has been held that a local county court must exercise its jurisdiction within the appropriate county, but when the jurisdiction has been exercised, the effects are not always limited to the county, or even to the state. A judgment recovered in one county, if the court had jurisdiction, is conclusive of the rights of the parties not only in that particular county, but throughout the state and throughout the United States⁵³ and perhaps throughout the world.⁵⁴ A county court even with equity powers is ordinarily a court of limited local jurisdiction. In other words it must exercise its jurisdiction in its own appropriate county; and notwithstanding the locality of the jurisdiction of such local court, still when a judgment is once rendered by that tribunal, that judgment by the law of some states may be enforced by execution issued to any other county of the state.⁵⁵

“This is not because the jurisdiction of the court is coextensive with the state, but because the policy of the law requires that the property of a debtor, wherever located within the state, should be subjected to the payment of his debts.”⁵⁶

It must be kept in mind that a court of equity which appoints a receiver acts in personam. When a receiver is ordered to sell land in the county wherein he is appointed, the court acquires jurisdiction to make the order of sale, not because the land lies in the county where the court sits, but from the fact that the court appointing the receiver, has a supervisory

⁵² See ch. III, *supra*.

⁵³ *Burnley v. Stevenson* (1873),
24 O. S. 474.

⁵⁴ *Lessee of Avery v. Pugh* (1839),
9 Ohio 67, at 68.

⁵⁵ *Lessee of Avery v. Pugh* (1839),
9 Ohio 67, at 69.

⁵⁶ *Lessee of Avery v. Pugh* (1839),
9 Ohio 67, at 69.

control over the receiver's actions until he is discharged. There can certainly be no more impropriety in permitting an order of sale to be executed in a distant county, than there is in permitting an execution issued upon a judgment of the same court sitting as a court of law to be enforced in a distant county.

Most states, however, have so-called venue statutes providing where suits affecting land shall be brought. Also statutes providing where sales of lands shall be held,⁵⁷ how sold, etc. These statutes must be followed if they cover lands sold under a receivership.

Said a California judge: "The grant of jurisdiction to a court in cases of real estate within a certain territory is equivalent to an exclusion of jurisdiction over real estate situate anywhere else. A court of limited jurisdiction territorially as certain lower state courts can not by their decree affect immediately title to real estate outside of their territorial jurisdiction either by setting aside a sale or by affirming a title." ⁵⁸

If a state has given a local court full equity jurisdiction and such court has proper jurisdiction of the cause and of the persons, it is hard to conceive any reason why it should not decree a sale of lands situate outside of the local territorial jurisdiction of that court but within the state. In fact it would seem that unless there is some constitutional or statutory provision to the contrary that a court of chancery when the original case is properly brought has power to make a sale of property in any part of the state.⁵⁹

One of the tests as to whether or not lands can be sold by one local court when they are located in another county or

⁵⁷ Ohio General Code, sec. 11696.

⁵⁸ *Watts v. White* (1859), 13 Cal. 321.

⁵⁹ *Atlantic Nat. Bank v. Perego-Jenkins Co.* (1908), 147 N. C. 293,

61 S. E. 68; *Cressler v. Tri-State Loan & Trust Co.* (1914), 182 Ind. 572, 107 N. E. 68. See Cent. Dig., secs. 231, 235; Dec. Dig., sec. 135.

district in the same state must be, can the court thus selling the lands enforce its order or decree confirming the sale?

If the property sold is within the state and one who is a party interferes, he is guilty of contempt. If the laws of the state allow process to go into another county and be there served, such party in contempt may be arrested and brought before the court which sold the property. If the laws of the state permit a sheriff of one county to go into another and make an arrest, then the appointing court can send its officer into such county and bring back the offender.

If one who is not a party to the suit in which the property was sold interferes with the possession and quiet enjoyment of the purchaser, then the purchaser can bring suit to quiet title or in ejectment as he may be in possession or out of possession. When the purchaser brings this suit in any court within the state, he may set up the judgment or decree which confirmed the title in him. Although a court of equity selling the land may not have jurisdiction coextensive with the state, nevertheless when it has jurisdiction of the persons and the suit is properly brought in one county and when it has exercised its jurisdiction over the persons before it, the effect is not always limited to the county and a judgment may be enforced by execution issued to any other county of the state if statutes so provide.⁶⁰

The decree confirming the title in the purchaser must be conclusive of the rights of the parties litigated in the suit wherein the property was sold. In some states the officers' deed itself is "prima facie evidence of the legality and regularity of the sale. All the estate and interest of the person whose property the officer so professed to sell and convey whether it existed at the time the property became liable to satisfy the judgment, or was acquired afterward shall thereby be vested in the purchaser."⁶¹

⁶⁰ Lessee of Avery v. Pugh (1839),
9 Ohio 69.

⁶¹ Ohio General Code (1910), sec.
11694.

It was held in Kentucky as follows: "An equitable suit is brought in one county by sureties to compel the original debtor to discharge his debt. He refused and the court ordered the defendant's real estate in another county sold, saying, "the court having jurisdiction of the person and cause of action, the proceedings in rem attached as an incidental remedy and it had jurisdiction to sell the mills and lands though situated in Estell county." ⁶²

It was again held in Kentucky: "The court of one county allows a receiver to dissolve a corporation, to sell lands in another county. The parties were before the court and the chancellor could not have granted complete relief if the right to decree a sale of the land in Warren county was denied." ⁶³

When a receiver is appointed by a court sitting in one county over lands in another county, due notice of the appointment should be made in the county where the lands are situated, and if the lands are ordered sold by the receiver, due notice of the proposed sale should be made in the county wherein the lands are situated and of the sale and confirmation thereof. This should be done whether the state statutes provide for the same or not, although such records when not provided for by statute may not be constructive notice to innocent parties not having actual notice.

§ 595. Receiver's Sale of Property outside of State or Country. "Courts of one state or country are without jurisdiction over title to lands in another state or county. The clause of the federal constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state is subordinate to this rule, and applies to the records and proceedings of the court only so far as they have jurisdiction." ⁶⁴

⁶² Webb v. Wright (1867), 2 Bush (Ky.) 124.

⁶³ Mechanics Trust Co. v. Cobb (1892), 14 Ky. L. R. 444.

⁶⁴ Public Works v. Columbia Col-

lege, 17 Wall. 521, 21 L. ed. 687; Watts v. Waddle (1832), 6 Pet. 389; Brine v. Insurance Co. (1877), 96 U. S. 627, at 635, 24 L. ed. 858; Davis v. Headley (1871), 7 C.

“The strict primary decree of a court of equity is in personam and may be enforced in all cases when the person is within the jurisdiction.”⁶⁵ In a case of fraud, or trust, or of contract the jurisdiction of a court of equity is sustainable, wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree.⁶⁶ However, a suit in chancery by one who has the prior equity against him who has the eldest patent is in its nature local, and if it be a question of title must be tried in the district where the land lies.⁶⁷

It has been held as follows: “A court of equity in one state, having acquired jurisdiction over the persons of the parties, may enforce a trust, or other specific performance of a contract, in relation to land situate in another state.

“Although a decree in such case or the deed of a master executed in pursuance thereof can not operate to transfer the title to such lands, yet the decree is binding upon the consciences of the parties and concludes therein in respect to all matters and things properly adjudicated and determined by the court.

“When the decree in such case finds and determines the equities of the parties in respect to such lands, and directs a conveyance by the parties in accordance with the equities, such decree, although no conveyance has been executed, may be pleaded as a cause of action, or as a ground of defense in the courts of the state where the land is situated; and it is entitled in the court when pleaded to the force and effect of record evidence of the equities therein determined, unless it be impeached for fraud.”⁶⁸

If the person to do the act decreed is within the jurisdiction of the court and the act may be done without the exercise

E. Gr. (N. J.) 115, at 121; *Nelson v. Potter* (1888), 50 N. J. L. 324, 15 Atl. 375; *Lindley v. O'Reilly* (1888), 50 N. J. L. 643, 15 Atl. 379.

⁶⁵ *Massie v. Watts* (1810), 6 Cranch 158, 3 L. ed. 181.

⁶⁶ *Massie v. Watts* (1810), 6 Cranch 160, 3 L. ed. 181.

⁶⁷ *Northern Ind. R. R. v. Railroad* (1853), 15 How. 233, 14 L. ed. 674.

⁶⁸ *Burnley v. Stevenson* (1873), 24 O. S. 474.

of any authority operating territorially within the foreign jurisdiction the court may act in personam and oblige the party to convey or otherwise to comply with its decrees. But it is not competent to the court to decree touching a foreign subject when the act to be done can be accomplished and performed only by an authority operating territorially.⁶⁹

A court of one state has power over all persons subject to its jurisdiction within the commonwealth and to order a person to make a conveyance in the court's jurisdiction to convey land elsewhere. The court could not in execution of its decree award a writ of sequestration or other writ against the lands in the other state, yet it might award an attachment for contempt in refusing to perform the decree.

When the decree is to affect lands directly as in the case of a suit brought to divide land in another state, the court would have no jurisdiction, although the parties live in the jurisdiction of the court, because the court's process could not be effectual.⁷⁰

A court may make an order upon the defendant to make a deed to the receiver or to a purchaser even if the property covered by the deed is located outside of the boundaries of the sovereignty creating the appointing court. However, if the receiver refuse, the court can not make a deed or direct its officer to make a deed because neither the court nor its receiver or master, or other officer of the court has title.

If the court does, however, attempt to make a sale and try to confirm a title in a purchaser, it can not protect that purchaser's title or right to quiet possession if he who interferes with the possession stays outside of the sovereignty of the creating court.⁷¹

§ 596. Receiver's Sale of Property in Another State by Trustees. It is in the United States courts undoubtedly a

⁶⁹ *Poindexter v. Burwell* (1886),
82 Va. 513.

⁷⁰ *Guerrant v. Fowler* (1806), 1
Hen. & M. (Va.) 5.

⁷¹ *Lindley v. O'Reilly* (1888), 50
N. J. L. 636, 15 Atl. 379.

recognized doctrine that a court of equity, sitting in one state and having jurisdiction of the person, may decree a conveyance by him of land in another state, and may enforce the decree by process against the defendant. True it can not send its process into that other state, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of title. And there seems to be no reason why it can not, in a proper case effect the transfer by the agency of trustees when they are complainants.⁷²

§ 597. Receiver's Sale of Franchises of Corporation. Most states by statute provide for a sale of franchises by a receiver of a railroad and for the purchaser to operate the property under those franchises.⁷³ Unless there is such a statute it is difficult to see how a receiver can sell franchises which were given to the company unless the grant by the legislature contemplated such a sale.⁷⁴

§ 598. Sale of Pledged Property under Louisiana Law. Under the Louisiana law it is held that, "while creditors may force a judicial sale of the pledge the property can not be sold for less than the pledgees claim."⁷⁵ Pledgor's cession of property does not affect pledgee's right of retention and sale.⁷⁶ The appointment of a receiver does not divest the possession of the pledgee, and a sale by the receiver in violation of the terms and contract of pledge does not bind the pledgor.⁷⁷

§ 599. Sale of Property by Unqualified Receiver. New York state makes it necessary by statute ⁷⁸ for a receiver before

⁷² *Muller v. Dows* (1876), 94 U. S. 449, 24 L. ed. 76; *Huguley v. Galetton Cotton Mills* (1901), 184 U. S. 290, at 296, 46 L. ed. 546, 22 S. C. Rep. 452.

⁷³ Ohio General Code, sec. 9075.

⁷⁴ See *Pilliod v. Angola Ry. & Power Co.* (1910), 46 Ind. App. 719, 91 N. E. 429, at 831.

⁷⁵ *Ozan Lumber Co. v. Goldonna Lumber Co.* (1909), 124 La. R. 1026,

at 1031, 50 So. 839, citing *Bier v. Gautier, etc.*, 35 La. Ann. 206.

⁷⁶ *Ozan Lumber Co. v. Goldonna Lumber Co.* (1909), 124 La. R. 1026, at 1031, citing *Jacquet v. Creditors*, 38 La. Ann. 864.

⁷⁷ *Ozan Lumber Co. v. Goldonna Lumber Co.* (1909), 124 La. R. 1026, at 1031, 50 So. 839.

⁷⁸ Code Civil Procedure, New York, sec. 715.

entering upon his duties to execute and file his bond and furthermore to file in the county where the debtor lives and also where he owns property a certified copy of the order appointing him receiver. A receiver who has failed to qualify as the statute provides can not make a valid sale of the debtor's interest in property and a purchaser upon such an alleged sale obtains no title.⁷⁹

§ 600. Sale of Property by Receiver Invalidly Appointed.

If a court is without jurisdiction to appoint a receiver and does so and its receiver sells property under an order of court valid on its face the owner of the property can not well complain against the receiver if the receiver was obeying the orders of court. All the court can do in such a case is to right its own wrong and restore the proceeds of the property to the true owner.⁸⁰

§ 601. Sale of Leasehold by Receiver when Not Assignable by Lessee. It was early said by Parker, C. J., of the Supreme Court of Massachusetts: ⁸¹ "Covenants not to assign, transfer, etc., are broken only by a voluntary transfer by the lessee; that sales on execution, the judgment being in invitum, are no breach, though if suffered for the purpose of evading the force of the covenants they shall be considered a breach." It therefore follows that upon a judicial sale of a leasehold, even though the lease was not assignable by the lessee it becomes assignable by operation of law even without the lessor's consent.⁸²

§ 602. Receiver's Sale of Property by United States Bankruptcy Court.⁸³ A court of bankruptcy has no power to collect a debt or seize any property beyond the boundaries of

⁷⁹ *Edgerly v. Blackburn* (1910), 125 N. Y. S. 353.

⁸⁰ *Beardsley Co. v. V. E. Ashdown & Co.* (1913), 73 W. Va. 132, 80 S. E. 128.

⁸¹ *Smith v. Putman* (1825), 3 Pick. 220, at 223.

⁸² *Zwietusch v. Luehring* (1914), 156 Wis. 96, at 110, 144 N. W. 257.

⁸³ See ch. XVII, "Receivers in Bankruptcy Proceedings."

its district, although the title vests in the trustee. In order to obtain any custody of such property (if custody is refused) it must call in the ancillary action of a local court, federal or state. It has no power whatever to itself execute the law when it acts beyond its own district. How is it then, that a bankruptcy court of one district may sell land in another? One answer to the question is that in so doing it acts only on the bankrupt's interest in the land, and makes the sale within the limits of its own district, and were it not for the Act of 1893,⁸⁴ there could formerly have been no doubt of the power.⁸⁵ This doubt has recently been removed by the supreme court⁸⁶ although it has always been the common practice in foreclosure cases for the court of primary jurisdiction to invoke the aid of other courts exercising ancillary jurisdiction in making sales of land beyond its own district, yet there is no doubt that courts of equity, acting in personam and within their own territorial limits, may dispose of the interests of all persons before them in any land whatever and wherever located. The English Court of Chancery sometimes foreclosed mortgages on property in the colonies, disposing of the property interests of the parties as though the lands were located in England. The question, therefore, is not one of power, but of statutory construction.

§ 603. Receiver's Sale by Chancery Court under Old Practice. The usual mode of selling property under a decree or order in chancery is a direction that it shall be sold with the approbation of a master in chancery, to whom the execution of the decree in that particular has been confided. It matters not whether the sale is public or private by a person authorized to make it. Not that the approbation of the master in either case completes a title to a purchaser. It is only the

⁸⁴ Act of March 3, 1893.

⁸⁵ *In re Britannia Mining Co.* 229 U. S. 254, at 263 57 L. ed. (1912), 197 Fed. 461.

⁸⁶ *Robertson v. Howard* (1912),

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master's approval of the sale, and is one step toward the purchaser getting a title. Before, however, a purchaser can get title, he must get a report from the master that he approves the sale, or that he was the best bidder, accordingly as the sale may have been made either privately or at auction. That report then becomes the basis of a motion to the court, by the purchaser, that his purchase may be confirmed. Notice of the motion is given to the solicitors in the cause, and confirmation nisi is ordered by the court, to become absolute in a time stated unless cause is shown against it. Then unless the purchaser calls for an investigation of the title by the master, it is the master's privilege and duty to draw the title for the purchaser, reciting in it the decree for sale, his approval of it and the confirmation by the court of the sale in the manner that such confirmation has been ordered.⁸⁷

§ 604. Receiver's Sale by Chancery Court under Code State Practice. Code states have no chancery court as distinguished from common-law courts. Such states, however, maintain chancery or equitable rights and remedies as distinguished from common-law rights and remedies. Not having a chancery court, they have no regular master in chancery. A receiver's sale is therefore ordinarily made by the receiver under direction of the court. When made, it is reported to the court appointing the receiver and the court affirms it or refuses to affirm it.

A judge acting with full chancery or equity powers is not restricted to the powers prescribed by common law, and, therefore, when no statutes interfere to the contrary, may order the sale at private or public sale, or at public auction, whichever way he may think best for the interests of the trust.

Notice of the sale and notice of the hearing of the application for confirmation of the sale should be given to all those interested in the trust. After confirmation the receiver should

⁸⁷ *Williamson v. Berry* (1850), 8 How. 495, at 545, 12 L. ed. 1170.

make a deed of the real estate and should give a bill of sale of the personalty, if requested, although such is not necessary, the confirmation of the sale of personalty itself conveying good title to the personalty.

§ 605. Resale of Property by Court of Equity. After a sale has once been made the chancellor or court of equity making the sale will, before confirmation, see that no wrong has been accomplished in and by the manner in which the sale was conducted. Yet the purpose of the law is that the sale shall be final, and to insure reliance upon such sales and induce biddings, it is essential that no sale be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining party prior thereto.⁸⁸

§ 606. Title of Purchaser at Receiver's Sale. An equitable or pendente lite receiver does not get title to the property which he is ordered to care for.⁸⁹

Not having title, he can not give title. However, a court of equity has power to sell property which has come into its possession.^{89a} When such court of equity sells property, although it may do so through a master or receiver or other officer, the court itself is the vendor. The officer of the court is the mere hand of the court to make the sale.

Under the old chancery rule was that "a bidder at a sale by a master under a decree of court is not considered a purchaser until the report of sale is confirmed, and he can not be compelled to complete his purchase until the confirmation of the report—that is, until his bid has been in some form accepted by the court—as the court stands in the place of the vendor, using the master to receive and report the bids."⁹⁰

⁸⁸ Justice Brewer, 1891, in *Pewabic Mining Co. v. Mason* (1891), 145 U. S. 349, at 356, 36 L. ed. 732, 12 S. C. Rep. 887. See *Morrison v. Burnette* (1907), 154 Fed. 617, at 625; *Ballentyne v. Smith* (1906),

205 U. S. 285, at 290, 51 L. ed. 803, 27 S. C. Rep. 527.

⁸⁹ *Evans v. Matthias* (1857), 7 E. & B. 602.

^{89a} See sec. 585, et seq., *supra*.

⁹⁰ Quoted in *Files v. Brown* (1903), 124 Fed. 133, at 137.

Sugden, Vendor and Purchaser, 3 London ed., 38, 39, 1st American ed. 33. Under the old English practice an order nisi was first entered as of course, and this was afterwards made absolute, also of course unless cause was shown to the contrary. The purpose of the whole proceeding was to show that the court accepted the bid and made the sale. Sugden, Vendor and Purchaser, 39, *infra*." Chief Justice Waite, in *Mayhew v. West Virginia Oil & Oil Land Co.*, C. C. (1885), 24 Fed. 205, at 215.

Such a bidder was not a purchaser at the time he bid, but was one who merely made a tender or offer to purchase, and he could not be compelled to complete his bargain until the confirmation of the sale.⁹¹

The old chancery rule has been abolished even in England, and the practice there has been made to conform to that in this country by an act of Parliament. Act 1867, 30 and 31 Victoria, ch. 48, sec. 7; 1 Sugden on Vendors, 14th ed., by Perkins, 114, note "a."⁹²

This old rule of chancery above mentioned has never prevailed in the United States, and the rule is almost universal that at a sale by a master or receiver under an order or decree in equity, which contemplates a subsequent report and confirmation of sale, a bidder becomes a purchaser when the officer announces the sale to him. Thereafter he may be compelled to complete his purchase and pay the price which he offered. Such a sale will not before confirmation be opened for bidders in the absence of proof of fraud or of misconduct at the sale.⁹³ It will not be set aside for inadequacy of price unless the inadequacy is so great as to shock the conscience.⁹⁴

⁹¹ *Morrison v. Burnette* (1907), 154 Fed. 617, at 623; see also *Magann v. Segal*, 92 Fed. 252, at 255; *Jennings v. Dumphy*, 174 Ill. 86, 50 N. E. 1045; *Vanbussum v. Maloney*, 2 Met. (Ky.), 550, at 552; *Summer v. Sessoms*, 94 N. C. 371; *Branch v. Griffin*, 99 N. C. 173, 5 S. E. 393, 398.

⁹² *Files v. Brown* (1903), 124

Fed. 133, at 137; *Morrison v. Burnette* (1907), 154 Fed. 617, at 623.

⁹³ *Files v. Brown* (1903), 124 Fed. 133, at 137.

⁹⁴ *Files v. Brown* (1903), 124 Fed. 133, at 137, citing *Graffan v. Burgess*, 117 U. S. 180, at 191, 192, 29 L. ed. 839, 6 S. C. Rep. 686; *Pevabic Min. Co. v. Mason*, 145 U. S. 349, at 367, 36 L. ed. 732, 21 S. C. Rep. 887.

What kind of a title can the court give? The court has not the legal title, therefore it can not make a deed as the real owner. A court, however, may order the real owner to make a deed to the purchaser, in which event the purchaser gets a legal title; or the court may order the owner to make a deed to the receiver and he may in turn make a deed to the purchaser; or the court having power to sell the property in its custody, orders the receiver, or other officer, to find a purchaser. The master finds a purchaser, gets a bid, makes a tentative sale and reports the same to the court. The court makes a decree confirming the sale and decrees the title in the purchaser. The receiver or other officer makes a deed. This deed is a recital of the court proceedings; it goes on record like any other deed, but is little more than a recital of court proceedings and notice unless the statute makes it more. A court of equity acts in personam, and not in rem. When the court of equity confirms the title in the purchaser, it protects the title in him by a process of injunction against interference by the original owner, by the parties to the suit and any one else who would be in contempt of court for interfering with the right and title of the purchaser as decreed by the court of equity.

The appointment of a receiver in a proceeding to foreclose a mortgage or other lien or in an attachment case may be said to be a proceeding in the nature of a proceeding in rem. In such cases the status of the property as between the plaintiff and other parties to the suit would be held to have been determined by the proceedings and by the sale. But the proceedings would not in any way affect the status of the property as to any other persons than the parties to the record and those claiming under them.⁹⁵

§ 607. Purchaser at Receiver's Sale Becomes a Party to Cause. The purchaser at a sale made by order of court, must come into court to obtain a decree vesting in him the title to the

⁹⁵ *Woodruff v. Taylor* (1847), 20 Vt. 63, at 71; *Black v. Manhattan Trust Co.* (1914), 214 Fed. 692.

property purchased. He is a party to the cause for the purpose of obtaining a decree to make the purchase effectual; and he is also a party when the conditions to be performed by him are to be enforced.⁹⁶ He becomes a party to the cause from the time he enters into a contract of purchase.⁹⁷

§ 608. Receiver Does Not Warrant Title to Purchaser. An officer of the court executing the orders of court has no authority in his official character to do any act that shall, expressly or impliedly, bind any one by warranty. If he steps out of his official duty and does what the law has given him no authority to do, he may make himself personally responsible and the injured party must look to him for redress.⁹⁸

A purchaser at a receiver's sale of property takes what he gets. The court selling the property through its receiver makes no warranty of title. The receiver executing the deed is the mere hand of the court; he is not liable for defect of title or insufficiency of the proceedings except for fraud. If he conveys with warranty, the covenant of warranty binds the receiver personally, and him only.⁹⁹ The doctrine of caveat emptor applies to the transaction unless the purchaser can prove fraud.¹

§ 609. Mode of Selling Property under Decree in Chancery. A court of equity formerly would order the defendant to make a conveyance to the real owner as so determined by the court.

⁹⁶ Deaderich v. Smith (1845), 6 Humph. 146.

⁹⁷ Rice v. Ahlman (1912), 126 Pac. 66, 70 Wash. 12.

⁹⁸ The Monte Allegre (1824), 9 Wheat. 616, at 644, 6 L. ed. 174; Homer v. Continental, etc. (1912), 198 Fed. 832.

⁹⁹ People v. New York B. L. Banking Co. (1907), 189 N. Y. 233, at 237, 82 N. E. 184; Matter of Coleman, 174 N. Y. 373, 66 N. E. 983; Rorer on Judicial Sales (2d Ed.),

547; "The Monte Allegre" (1824), 9 Wheat. 616, at 644, 6 L. ed. 174; Homer v. Continental & Commercial Trust & Savings Bank (1912), 198 Fed. 832, at 835.

¹ Whitlock v. Lumber Co. (1910), 152 N. C. 192, at 194, 67 S. E. 504; Larch v. Aultman, 75 Ind. 162; Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548; Southern Cotton Mills v. Ragan (1912), 138 Ga. 504, at 507, 75 S. E. 611.

In default of their making a deed, a court of equity will order a commissioner to make a deed.²

Where a court has full jurisdiction both as to parties and the property, a sale and conveyance in obedience to a decree is as effectual to convey the legal title as the deed of a sheriff, made pursuant to a sale under an execution issued upon a judgment at law. When the object of the suit is to compel the conveyance of the legal title by the defendant, and the decree does not require a sale, the title will not pass until the deed is executed or unless it be provided, as it has in some states by statute, that the decree itself shall operate as a conveyance. In all such cases the court has power to compel the defendant to convey.³

The usual mode of selling property under a decree or order in chancery is a direction that it shall be sold with the approbation of a master in chancery, to whom the execution of the decree in that particular has been confided. It matters not whether the sale is public or private by a person authorized to make it. Not that the approbation of the master in either case completes a title to a purchaser. It is only the master's approval of the sale, and is one step toward a purchaser's getting title. Before, however, a purchaser can get title, he must get a report from the master that he approves the sale, or that he was the best bidder, accordingly as the sale may have been either privately or at auction. That report then becomes the basis of a motion to the court by the purchaser that his purchase may be confirmed. Notice of the motion is given to the solicitor in the cause and confirmation nisi is ordered by the court—to become absolute in a time stated, unless cause is shown against it. Then, unless the purchaser calls for an investigation of the title by the master, it is the master's privilege and duty to draw the title for the purchaser, reciting in it the decree of sale, his approval of it and the confirmation by the court of the sale, in the manner that such confirmation has been ordered.⁴

² Boone v. Chiles (1836), 10 Peters 176, 9 L. ed. 388.

³ Miller v. Theony (1864), 69 U. S. 237, 17 L. ed. 827.

⁴ Williamson v. Berry (1850), 49 U. S. 545, 8 How. 545, 12 L. ed. 1170; Blossom v. Railroad Co. (1865), 70 U. S. 206, at 196, 18 L. ed. 43.

§ 610. Mode of Proceeding to Give Purchaser Possession.

The general power of a court of chancery to issue an injunction directing possession to be delivered is sanctioned by the practice in England.⁵ The decree for possession and injunction is a process demandable of right as much as an attachment or other execution and ought not to be refused when the power is considered to exist.⁶

The old English practice was to enjoin the defendant to deliver possession, then a writ of assistance directed to the sheriff commanding him to aid and assist to put the plaintiff in possession.⁷

Chancery court will enforce its decrees by process for the actual delivery of possession whenever in pursuance of the decree such possession ought to be delivered.⁸ A writ of assistance is directed to the sheriff, commanding him to give possession. The writ of assistance is to be considered as the only necessary process of the chancery court for giving possession of land which has been the subject of adjudication.⁹

§ 611. Sale Generally after Final Decree. A receiver is appointed for the purpose of preserving and caring for property and at times to realize property. When the object is to preserve other property, it must be held intact to meet the final adjudication of the courts as to the rights of the parties claiming the property. Therefore the property itself can not be sold except in a few cases, which will be treated under the following sections:

When the object of a receiver is to realize the property, then the sale follows the final order of the court except in peculiar cases which will be treated in the following section and subsections. With few exceptions, the right of the party moving

⁵ *Dove v. Dove* (1783), 2 Dick. 617; *Stribley v. Hawkie* (1744), 3 Atk. 275.

⁶ *Dorsey v. Campbell* (1825), Blands Ch. R. 363; *McKomb v. Kankey* (1807), Blands Ch. R. 363.

⁷ *Stribley v. Hawkie* (1744), 3 Atk. 275.

⁸ *Kershaw v. Thompson* (1820), 4 Johns. 609.

⁹ *Valentine v. Teller* (1825), 1 Hopk. 422.

for the receiver to realize the property has not made out his right to realize the property until decree or foreclosure or other final decree.

§ 612. Sale Sometimes before Final Decree. The power of the court ordering a sale of property on an interlocutory order before final decree is one of an extraordinary character, and should never be exercised except in very plain and unquestionable cases. Indeed, it should plainly appear beyond reasonable doubt, either by proof or from the very nature of the case itself, that a sale must inevitably be decreed in final hearing to justify the passing of an interlocutory order; especially if applied for by the complainant only and before the appearance and answer of the defendants who may be affected by the sale. It is true, there may be cases where such an order would be proper even before the appearance and answer of the defendants; but this can only be the case where from the nature of the proceedings and evidence disclosed by them, the court can see with certainty that the final decree in the cause will require the property to be sold; and not only that it will be required to be sold as the proper, direct and ultimate relief prayed, but there should exist a necessity for an immediate sale. And even in the most pressing cases, where it is practical or possible, all parties who may be affected by the sale should have an opportunity to be heard and to show cause against it before the order is passed. Otherwise great injustice might frequently be done in the exercise of this power, which was intended to be exercised, not for the benefit of one party only, but for the benefit and protection of all concerned.¹⁰ Where the property is in the custody of the court, the court is compelled to act for both parties, not at the instance and for one party only, and may in extreme cases, where it is satisfied that a sale must eventually be made, order such sale in advance.¹¹

(a) Sale of Property of Insolvent Debtor before Final Decree. Ordinarily, the receivers appointed pending the action

¹⁰ *Cornell v. McCann* (1872), 37 Md. 89, at 99.

¹¹ *Stewart v. Love* (1879), 71 Tenn. 374, at 375.

particularly as to real estate, should simply be directed by the court to take care of and let the property; in proper cases collect the rents, etc., and to collect debts and hold funds coming into his hands, subject to the orders of the court, from time to time and when the action is determined. But there are cases in which it is expedient and very proper to direct a sale of the property, both real and personal.¹² The court should always be careful to see, however, that a proper case is presented for the exercise of such power, and to see particularly that the owner of the property can not be unduly prejudiced by a sale thereof. It should have in view the rights and advantages of all the parties as nearly as may be.¹³

It would seem highly proper and within the power of the court appointing a receiver to order before final decree the sale of the assets of an insolvent corporation or individual when it is certain that the corporation or individual is insolvent and that the assets must be sold sooner or later to satisfy the numerous debts to creditors parties to the action. The funds should be retained by the receiver under the orders of the court and distributed to those entitled upon the final hearing and disposition of the case.¹⁴

(b) Sale of Property of Insolvent Railway before Final Decree. In a proper case, a court of equity having possession by a receiver of the property of an insolvent railway company, may make an interlocutory order for the sale of the property before the rights of the parties under several mortgages have been fully ascertained and determined.¹⁵

(c) Sale of Property Deteriorating before Final Decree. Real estate, in the hands of a receiver pendente lite, deteriorat-

¹² *Wabash R. Co. v. West Side Belt Ry. Co.* (1912), 197 Fed. 442; *Taylor v. Philadelphia & Reading Ry. Co.*, 9 Fed. 1; *In re Metropolitan Railway Receivership*, 208 U. S. 90, 52 L. ed. 403, 28 Sup. Ct. Rep. 219; *Boothe v. Summit Coal Mining Co.* (1911), 63 Wash. 630, 116 Pac. 269.

¹³ *Machine Co. v. Lumber Co.*

(1891), 109 N. C. 516, at 580, 13 S. E. 869.

¹⁴ *State v. Shelton* (1911), 238 Mo. 281, 142 S. W. 417.

¹⁵ *Wabash R. Co. v. West Side Belt R. Co.* (1912), 197 Fed. 443; *Pennsylvania R. B. v. Allegheny* (1890), 42 Fed. 85; *First Nat. Bk. v. Shedd* (1886), 121 U. S. 74, 30 L. ed. 877, 7 S. C. Rep. 870.

ing and depreciating in value, requiring funds to insure and guard it, and no one being obliged to advance such funds, and which must ultimately be sold, may be sold before final hearing.¹⁶ This same reasoning often applies to a business in the hands of a receiver. A receiver is ordered to run the business, often not with a view to make profits for the creditors, but to preserve the values in the property as a going concern. If closed up and the business dissipated, much of the value would be lost. On the other hand, the most advantageous time to sell may well be before final hearing of the main suit on which the receivership has been predicated. In such a case, if the court is thoroughly satisfied that a sale must eventually be made and that it would be to the advantage of the trust, then a sale may well be ordered before final hearing.¹⁷

§ 613. Manner and Conditions of Receiver's Sale. Said Mr. Justice Brewer, of the United States Supreme Court in 1891:¹⁸ "It may be stated generally that there is a measure of discretion in a court of equity both as to the manner and conditions of such a sale (sale by a master, and the same rule applies to receiver's sale),¹⁹ as well as to ordering or refusing a resale. The chancellor will always make such provisions for notice and other conditions as will in his judgment best protect the rights of all interested, and make the sale most profitable to all; and after a sale has once been made, he will certainly, before confirmation, see that no wrong has been accomplished in and by the manner in which it was conducted."

§ 614. No Assignment to Receiver Necessary. There is no doubt that it is usual in some jurisdictions for the court appointing a receiver to direct and require the person or corporation whose estate is so placed (in the hands of a receiver)

¹⁶ *Gleaves v. Ferguson* (1877), 2 Tenn. Cases 560.

¹⁷ *State v. Shelton* (1911), 142 S. W. 417; *Boothe v. Summit Coal Mining Co.* (1911), 116 Pac. 269, 63 Wash. 630.

¹⁸ *Pewabic Mining Co. v. Mason* (1891), 145 U. S. 349, at 356, 36 L. ed. 732, 6 S. C. Rep. 686.

¹⁹ Author's parenthesis.

to make an assignment to the receiver; but this is a matter formal in character and having no substantial effect upon the title, as it is evidenced by the ruling that no reassignment is necessary to reinvest the assignor in such cases with the title when the purposes for which the suit in which the receiver is appointed are accomplished without a sale of the property.²⁰

We apprehend that no assignment is necessary to entitle the court appointing a receiver to pass title through a sale made by him under its orders.

Title to the property remains in the debtors, subject to the possession and control of the receiver until he sells the property under direction of the court, when the title passes to the purchaser.²¹

§ 615. Petition and Order of Sale Necessary. Ordinarily a receiver *pendente lite* is merely a stakeholder and has no powers to sell; his main work is to preserve the property until further orders of court. A chancery court appointing a receiver has undoubted authority to order a sale of the property to preserve the trust for the parties interested. If the original petition upon which the receiver was appointed and the order appointing the receiver did not provide for a sale of the property, then a petition to sell the property should be filed, and before the receiver can properly sell the property he must have an order from court. If the original petition did pray for a receiver and a sale, then it has been held that a further petition is unnecessary.²² A receiver should be very careful before making a sale to ascertain that he has ample authority to do so.

§ 616. What Order or Decree for Sale Should Contain.
First. A finding of facts or an adjudication warranting a sale.

²⁰ *Russell v. Railway Co.* (1887), 68 Tex. 646, 5 S. W. 686. (1903), 69 O. S. 24, at 39, 68 N. E. 582.

²¹ *The State Nat. Bk. v. Esterley*

²² *Smith v. Burton* (1895), 67 Vt. 514, 32 Atl. 467.

Second. It should specifically describe the land ordered to be sold, and not depend upon pleadings, deeds, or other papers for the description.²³

Third. It should expressly declare by whom the sale shall be made.

Fourth. It should specify when, where and on what terms the sale shall be made.²⁴

Fifth. It should order the receiver to report the sale to the court and also to hold any funds or other consideration for the sale, subject to the further orders of the court.

§ 617. Notice of Receiver's Sale of Property. Unless there is some statute regulating sales by receivers, they being judicial sales made by courts of equity, are regulated as to the time, manner, terms of sale and notice thereof by the court appointing the receiver.²⁵ Notice should be given to all interested parties, yet when no such requirement is made by statute, a sale otherwise proper may not be set aside for failure to give notice to the defendant in the case.²⁶ Said Justice Brewer, of the United States Supreme Court: "The chancellor will always make such provisions for notice and other conditions as will in his judgment best protect the rights of all interested and make the sale most profitable to all."²⁷

The United States Statutes provide for notice of such sales.²⁸ Many states provide by statute for notice²⁹ and by mailing notice to creditors.³⁰

§ 618. Sale at Public Auction or Private Sale. There is no statute in most states prescribing how and in what manner re-

²³ *Pilliod v. Angola Ry. & Power Co.* (1910), 91 N. E. 829, 46 Ind. App. 719.

²⁴ *Gibson's Suits in Chancery*, sec. 624.

²⁵ *Nesbet v. Great Western Ry.* (1905), 41 Wash. 107, at 114, 83 Pac. 15. See *New Britain Mach. Co. v. Watt* (1915), Texas Civ. App., 180 S. W. 624; *In re Newark Sav. Inst.* (1887), 9 Atl. 375.

²⁶ *Farmers Hdw. & M. Co. v. Thacker* (1916), — Okla. —, 153 Pac. 1144.

²⁷ *Pewabic Mining Co. v. Mason* (1891), 145 U. S. 349, at 356, 36 L. ed. 732.

²⁸ Act of March 3, 1893, ch. 225, secs. 1, 2, and 3. See ch. XXX, *infra*.

²⁹ Pennsylvania, Act of May 11, 1911, Pennsylvania Laws, 261; amended Act of April 24, 1913, Pennsylvania Laws, 114.

³⁰ Pennsylvania, Act of April 24, 1913, Pennsylvania Laws, 114; *Calvert v. Wood* (1914), 246 Pa. 325, at 328, 92 Atl. 301.

ceiver's sales shall be made. A court of chancery is bound by no forms unless prescribed by statute, but looks to the substance of things and strives to best promote the interests of all concerned.³¹

Sales are generally made by the receiver publicly and at auction on due advertisement of the time, place and terms.³²

Nevertheless, when the court decrees it expedient for the welfare of the parties to the order and for the trust, it may make an order to the receiver to sell at private sale, or the court may accept an offer made directly to the court, or may ratify a sale already made.

§ 619. Court May Fix Minimum Bid or Upset Price. If the court is advised at the time of making the order of sale as to enable it to fairly judge of the probable value of the property, it may fix a minimum bid below which bids will not be accepted by the receiver.³³ This is generally called an upset price.

§ 620. Report of Sale by Master or Receiver to the Court. As soon as the land or other property has been sold, the receiver should make out and submit to the court a report showing the property sold, the person to whom sold, when sold, the consideration of the sale, the money collected, the amount still due, if any, and how secured, and other matters connected with the sale that are pertinent and naturally proper to be stated. This report should describe the land by metes and bounds, or other accurate description, unless it is so described in the order for sale, in which event that sold should be identified carefully with that set out in the order for sale. This report should be filed in court immediately following the sale.

³¹ Gibson's Suits in Chancery, sec. 625.

³² Cressler v. Tri-State Loan & Trust Co. (1914), 107 N. E. 68, 182 Ind. 572.

³³ Union Trust Co. of Indianapolis v. Curtis (1914), 105 N. E. 562, 182 Ind. 57; Hewett v. Walters (1911), 21 Idaho 1, 119 Pac. 705,

at 708, citing Bryan v. Block (1889), 52 Ark. 458, 12 S. W. 1073; Slaughter, et al., v. Strother (1890), 99 Ga. 633; In re Newark Sav. Inst. (1887), 9 Atl. 375; First Nat. Bk. v. Bunting (1900), 7 Idaho 387; Nesbet v. Great Western Ry. (1905), 41 Wash. 107, 63 Pac. 694.

§ 621. Confirmation of Sale of Personalty and Real Estate.

When the receiver makes a sale of personalty and reports the sale to the court, showing that the purchaser has complied with the terms of the sale, the sale becomes complete upon confirmation by the court,³⁴ and the title to the personalty so sold becomes vested in the purchaser without any further formal decree and without any bill of sale or other conveyance by the receiver.

In sales of realty, however, the mere confirmation of the report of sale does not of itself divest and vest the legal title; it only completes the sale.³⁵ The title must be passed by a decree or by deed in pursuance of a decree for that purpose. It is usual to combine the confirmation of the report of sale and the decree of sale in one pleading or court paper and mark it "Confirmation of Report and Decree of Sale." See form —.

Confirmation when Subsequently Higher Price Is Offered.

It has been held by the Supreme Court of New Jersey, in the case of sales by courts of equity, that where the sale is made for a fair price and in good faith, and there is no irregularity, fraud, mistake or legal surprise with which the purchaser is or ought to be chargeable, the subsequent offer by another bidder of a higher price is not of itself sufficient for refusing confirmation.³⁶

§ 622. Discretion of Judge to Modify Orders Affecting Sale.

A trial judge in equity proceedings exercising authority over a sale of property in the control of the court, has discretionary power to modify his orders affecting such sale by subsequent

³⁴ Northern Brewery Co. v. Princess Hotel (1915), 78 Or. 453, 153 Pac. 37, at 38; Farmers, etc., v. Thacker (1915), 153 Pac. 1144, at 1145, — Okla. —. See Williamson v. Berry (1850), 8 How. 469, at 547, 12 L. ed. 1170.

³⁵ Walters v. Hargrove, 61 Ga. 268; Rorer, Judicial and Execution Sales, sec. 106; Hall v. Taylor

(1909), 133 Ga. 606, at 607, 66 S. E. 478.

³⁶ Adams v. Lambertville Heat, L. & P. C. Co. (1914), 84 N. J. Eq. 96, at 99, 92 Atl. 602, citing Morrissee v. Inglis, 46 N. J. Eq. 356, 19 Atl. 16; Rogers v. Rogers Locomotive Co., 62 N. J. Eq. 111, 50 Atl. 10; Hoffman v. Godfrey, 79 N. J. Eq. 617, 82 Atl. 900.

orders.³⁷ The chancellor or judge administering equity will protect the rights of all interested and make the sale most profitable to all, and after a sale has once been made, he will certainly, before confirmation, see that no wrong has been accomplished in and by the manner in which the sale was conducted.³⁸

“Yet the purpose of the law is that the sale shall be final; and to insure reliance upon such sales and induce biddings, it is essential that no sale be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining party prior thereto.”³⁹ “A judicial sale of real estate will not be set aside for inadequacy of price unless the inadequacy is so great as to shock the conscience, or unless there is additional circumstances against its fairness.”⁴⁰

The chancellor or equity judge has a large discretion in the approval or disapproval of equity sales.⁴¹ The discretion of the chancellor in such cases is a sound legal discretion and can not be arbitrarily withheld.⁴²

Mere inadequacy of price may at times afford good reason for refusing to confirm a sale;⁴³ it is not always or necessarily allowed as controlling.⁴⁴ A vendee should not be compelled to

³⁷ In re Great Western Beet Sugar Co. (1912), 22 Idaho 328, at 334, 125 Pac. 797; Hale, et al., v. Clauson (1875), 60 N. Y. 339, at 341.

³⁸ Pewabic Mining Company v. Mason (1891), 145 U. S. 349, at 356, 36 L. ed. 732, 12 S. C. Rep. 887.

³⁹ Pewabic Mining Co. v. Mason (1891), 145 U. S. 349, at 356, 36 L. ed. 732, cited in Magann v. Segal (1899), 92 Fed. 252, at 256; Grede v. Dannenfelser (1877), 42 Wis. 78, at 84.

⁴⁰ Graffam v. Burgess, 117 U. S. 180, 29 L. ed. 839, 6 S. C. Rep. 686, cited in Fidelity Insurance, Trust & Safe Deposit Co. v. Roanoke Iron Co. (1898), 84 Fed. 744, at 755. See also Blanks v. Farmers Loan & T. Co. (1903), 122 Fed. 849, at 851.

⁴¹ Morrison v. Burnette (1907), 154 Fed. 617, at 624; Copping v.

Manufacturing Co. (1910), 153 N. C. 329, 69 S. E. 250; Adams v. Lambertville Heat, L. & P. Co. (1914), 84 N. J. Eq. 96, at 99 (1915), affirmed, 95 Atl. 609; Walters v. Hargrove, 61 Ga. 268; Rorer on Judicial Sales, sec. 106; Hall v. Taylor (1909), 133 Ga. 606, at 607, 66 S. E. 418.

⁴² Hall v. Taylor (1909), 133 Ga. 606, at 607, 66 S. E. 418.

⁴³ Arlington H. R. Co. v. Citizens Ry. & L. Co. (1913), 160 S. W. 1109, Tex. Civ. App. See Dilley v. Jasper L. Co., 122 S. W. 255, 103 Tex. 22.

⁴⁴ Copping v. Manufacturing Co. (1910), 153 N. C. 329, at 331, 69 S. E. 250, citing Uzzle v. Weil, 152 N. C. 131; Trull v. Rice, 92 N. C. 572; Vaughan v. Gooch, 92 N. C. 524; Pritchard v. Askew, 80 N. C. 86.

take an estate fettered with encumbrances by which he may be subjected to litigation to procure the title, and a receiver's attempted sale of such encumbered property may be set aside and a court may refuse to confirm or ratify such a sale.⁴⁵

§ 623. What Order of Confirmation Should Contain.⁴⁷ An order or decree confirming a sale made by a receiver should naturally have the caption of the case wherein the receiver was appointed and the receiver's sale made. The caption will contain some of the names of the parties having an interest in the property sold. If all such names do not appear in the caption, or even if they do so appear, they should be carefully set out in the body of the order or decree of sale.

The decree should set out that the cause was heard on the record of the case, including the decree for sale and on any testimony and on the report of the receiver. This report should be ordinarily inserted in the decree or order of sale.⁴⁶

A statement should be inserted that the report was unexpected to, and upon motion of a party to the suit, or the purchaser was and is hereby confirmed.

Then should follow the orders of the court finding and vesting the title in the purchaser and ordering how the purchase money shall be paid, and either held subject to the orders of court or distributed as the court then orders.

§ 624. Rights of Bidders before and after Confirmation of Sale. Judge Sanborn, speaking for the Circuit Court of Appeals for the Eighth Circuit, 1907, has announced the rights of parties before and after confirmation of a judicial sale as follows: "There is a marked and radical distinction between the situations, the rights of the parties and the established practice before and after the confirmation of the sale. The

⁴⁵ *Mullikin v. Platt* (1911), 80 Atl. 1023, 115 Md. 480.

⁴⁶ The statutes of some states demand that this report be incorporated in the decree or order. See Code of Tennessee, sec. 4047.

⁴⁷ For form of decree or order confirming a sale made by a receiver, see Forms, ch. XXXVIII, Vol. II, *infra*.

purchaser bids with full notice that the sale to him is subject to confirmation by the court, and that there is a power granted and a duty enforced upon the judicial tribunal when it comes to decide whether or not the sale shall be confirmed to so exercise its judicial power as to secure for the owners of the property the largest practical returns.

"He is aware that his rights as a purchaser are subject to the rational exercise of this discretion. But after the sale is confirmed that discretion has been exercised. The power to sell and the power to determine the price at which the sale shall be made has been exhausted. From thenceforth the court and the successful bidder occupy the relation of vendor and purchaser in an executed sale, and nothing is sufficient to avoid it which would not set aside a sale of like character between private parties. Hence the rule is settled, and it seems to be universally approved that after confirmation of a judicial sale neither inadequacy nor offers of better prices, nor anything but fraud, accident, mistake or some other cause, for which equity would avoid a like sale between private parties, will warrant a court in avoiding the confirmation of the sale or in opening the latter and receiving subsequent bids."⁴⁸

"This rule is so firmly established that it is no longer debatable, and the cogent and all-sufficient reason for it is that judicial sales would become farces and rational men would shun them and refuse to bid if, after confirmation, unsuccessful bidders or dissatisfied litigants could avoid them and secure new sales by offers of higher prices when they thought the purchase a fortunate one, and thus secure the profits in that event and leave the buyer to suffer the losses if the property depreciated in value or the purchase was unwise."⁴⁹

⁴⁸ *Morrison v. Burnette* (1907), 154 Fed. 617, at 624, citing *Files v. Brown* (1903), 124 Fed. 133, at 137; see *Watson v. Birch*, 2 Ves. Jr. 51, Lord Ashurst; *Morice v. Bishop of D.*, 11 Ves. 57, Lord Eldon; *Vir-*

ginia Fire & Marine Ins. Co. v. Cottrell (1889), 85 Va. 857, and cases cited, 9 S. E. 132.

⁴⁹ *Morrison v. Burnette* (1907), 154 Fed. 617, at 625; see *Pewabic Mining Co. v. Mason* (1891), 145 U.

§ 625. Rights of Grantee of Purchaser at Receiver's Sale.

A purchaser at sheriff's sale⁵⁰ and judicial sales, including receivers' sales, although a stranger to the judgment or decree of court, by his purchase submits himself to the jurisdiction of the court in respect to the sale and purchase. All acquiring title from and under such purchaser, take subject to the same jurisdiction. A conveyance to a bona fide purchaser may be a circumstance which will influence the court in the exercise of its discretion, but does not take away jurisdiction.⁵¹

A grantee from such purchaser at a sheriff's or judicial sale takes the place of his grantor, and consents to the same jurisdiction, under and subject to which the title is held. He has notice of the source of his grantor's title and knowledge of the power of the courts over titles thus acquired, and takes no better or more perfect title as against interference of the court than his grantor had.⁵²

§ 626. Purchaser of Leasehold Bound by Covenants in Lease.

A purchaser of a leasehold estate at a judicial sale is bound by the covenants in the lease under the transfer of the lease to them by operation of law.⁵³

§ 627. Purchaser's Liability for Contracts of Original Owner. It frequently happens that owners of property which goes into the hands of receivers have entered into contracts and agreements concerning that property. What is the status of those agreements when the receiver takes the property and what effect, if any, have those contracts or agreements on the property when sold to a purchaser through a receiver's

S. 349, at 356, 36 L. ed. 732, 12 S. C. Rep. 887; contra, the Supreme Court of Montana lays down a rule making little or no distinction between the rights of parties before and after confirmation, in re Receivership of First Trust & Savings Bank (1912), 122 Pac. 561, 45 Mont. 89.

⁵⁰ Hale, et al., v. Clauson, et al.

(1875), 60 N. Y. 339, at 341; *Cazet v. Hubbell*, 36 N. Y. 677; *May v. May*, 11 Paige 201; *Grede v. Dannenfelser* (1877), 42 Wis. 78.

⁵¹ Hale, et al., v. Clauson, et al. (1875), 60 N. Y. 339, at 341.

⁵² Hale, et al., v. Clauson, et al. (1875), 60 N. Y. 339, at 342.

⁵³ *Zwietusch v. Lühring* (1914), 156 Wis. 96, at 112, 144 N. W. 257.

sale? A purchaser at a judicial sale, including a receiver's sale, can only be bound as to claims against the property by reason of obligations of the original owner concerning the property, provided the order of court making the sale imposes liabilities on the purchaser or on the property purchased.⁵⁴

Of course, in order to make the receiver's sale valid against liens and other incumbrances of record, the parties to such liens or incumbrances must be brought into the suit.⁵⁵

It therefore follows that at a receivership sale of property free of all claims, or such a sale not expressly subject to claims unsecured by liens, the purchaser of a franchise and subsequent corporations operating the property and franchises take the property free of all claims which might have been asserted by an action against the original owner.⁵⁶ The question of notice may affect the liability.⁵⁷

§ 628. Receiver or Master Makes Deed to Purchaser.

Originally the chancery court, acting only in personam and unaided by statute, could only pass title to land by compelling the parties before them to execute conveyances, the courts enforcing such orders to make conveyances by process of contempt and by process of sequestration. Now by statute of some states the court may by decree divest the title to property, real and personal, out of any of the parties to the suit and vest it in others, and such a decree has all the force and effect of a conveyance by such parties executed in due form of law, provided the provisions of the statute are complied with. The court may also appoint a commissioner or other officer to execute all necessary conveyances, releases and acquittances, either in his

⁵⁴ *Houston & Texas Central R. Co. v. Crawford* (1895), 88 Tex. 278, 31 S. W. 176, 28 L. R. A. 761; *Olcott v. Headrick*, 141 U. S. 543, 35 L. ed. 851, 12 S. C. Rep. 81.

⁵⁵ *Shaud v. Hanley* (1877), 71 N. Y. 319, at 324; *Chautauqua County Bk. v. Risley*, 19 N. Y. 369.

⁵⁶ *Hutchinson v. International & G. W. Ry. Co.* (1908), 111 S. W. 1101, at 1106, Tex. Civ. App.; *Abilene Light & Water Co. v. Clack* (1909), 124 S. W. 201.

⁵⁷ *Abilene Light & Water Co. v. Clack* (1909), 124 S. W. 201, Tex. Civ. App.

name or in the name of the party, as the court may think proper, and the instrument so executed will be as valid as if executed by the party.⁵⁸

When a master in chancery or a receiver makes a deed, he, not having title, does not convey in the sense that the owner of the property would convey. A deed by a master in chancery or by a receiver, or other officer of the court, is a recital of the court proceedings, and when recorded becomes notice, in addition to the court records, of the proceedings and the decree. The court itself really passes title by its decree and the court itself is the vendor.

§ 629. What Receiver's Deed Should Contain. Some states provide by statute what a deed by an officer of the court shall contain,⁵⁹ and a receiver's deed should contain the following provisions, and in addition any statutory provisions, if any obtain:

First. "Names of the parties to the judgment," meaning the parties to the main suit and any subsequently added, including parties to the order of sale, if there are any new parties different from those of the main suit. In fact, the names of all the parties out of whom the title is to be divested.

Second. "Date and amount of the judgment," meaning a recital of the rendering of the decree or order of sale and when rendered. If the case has gone to final hearing, recite the amount of final judgment. If the case has not gone to final hearing, you can obviously not recite the judgment.

Third. A recital of the essential facts of the order of sale, such as commanding one to sell the following tract of land, or other property (describing the land or other property conveyed).⁶⁰

Fourth. The substance of the officer's return therein, "And whereas said tract of land was by me sold according to," etc.

⁵⁸ Gibson's Suits in Chancery, sec. 649.

⁵⁹ Ohio General Code, sec. 11693.

⁶⁰ Pilliod v. Angola Ry. & Power Co. (1910), 91 N. E. 829, 46 Ind.

App. 719.

Fifth. Order of confirmation, "Substance of the order confirming the sale."

Sixth. Statement that the receiver is or was by said decree authorized and directed to execute a deed.

Seventh. Now, therefore, in consideration of the premises, etc., I hereby convey, etc. * * *

Eighth. Signature by receiver in his official character before two witnesses and proper acknowledgment as of other deeds.

§ 630. Date of Taking Effect of Receiver's Sale. The general doctrine relating to the effect of the confirmation of a judgment sale is that it relates back to the day of sale and passes a title as of that day. The deed executed pursuant to the order of confirmation by relation takes effect as of the day of sale.⁶¹

§ 631. Essentials to Give Purchaser a Good Title. While chancery sales are conclusive upon all parties to the suit, and, as a result, almost universally confer a good title upon the purchaser, nevertheless there is no warranty of title.⁶²

It is therefore incumbent on the purchaser to ascertain:

First. That the court had jurisdiction in the cause.⁶³

Second. That the court has jurisdiction under the pleadings to make the sale.⁶⁴

Third. That the parties to the suit whose property is sold have a good title.

Fourth. That all the persons having an interest in the property, legal or equitable, are duly in court.

The purchaser is not charged with the burden of investigating the merits of the controversy if the court had jurisdiction to sell and the parties to the sale have title.

⁶¹ Joy v. Midland State Bank (1910), 128 N. W. 147, 26 S. D. 244; Boyd v. Longworth (1842), 11 Ohio 236; Oviatt v. Brown (1846), 14 Ohio 286; Jashenosky v. Volrath (1899), 59 O. S. 540, at 544, 53 N. E. 46.

⁶² Gibson's Suits in Chancery, sec.

640; The Monte Allegre (1824), 9 Wheat. 644, 6 L. ed. 174; Homer v. Continental, etc. (1912), 198 Fed. 832.

⁶³ McGavock v. Bell (1866), 3 Cold. (Tenn.) 512.

⁶⁴ Harned v. Beacon Hill, etc. (1911), 80 Atl. 805, 9 Del. Ch. 232.

If the defendant whose property was sold has no title, the purchaser will get none.⁶⁵

The purchaser is not bound to inquire whether any errors intervened in the action of the court, or irregularities were committed by the receiver in the sale any more than a purchaser under execution upon a judgment is bound to look into the errors and irregularities of a court in the trial of the case, or of the officer in enforcing its process.⁶⁶

Curing of Irregularity in Judicial Sale. Said Morrow, C. J., speaking for the United States Circuit Court of Appeals for the Ninth District: ⁶⁷ "It is the general rule in the United States that the confirmation of a judicial sale by a court of competent jurisdiction cures all irregularities in the proceedings leading up to or in the conduct of the sale, and that, while such a sale will be set aside where fraud, mistake, or surprise is shown, mere irregularities in the preliminary proceedings do not render the sale invalid and will not suffice to set it aside after confirmation," citing *Wills v. Chandler* (C. C.), 2 Fed. 273; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Ludlow v. Ramsey*, 11 Wall. 581, 20 L. ed. 216; *Stockmeyer v. Tobin*, 139 U. S. 176, 11 Sup. Ct. 504, 35 L. ed. 123.

§ 632. Duty of Receiver when Purchaser Refuses to Pay. When purchaser refuses to pay the purchase price as agreed or makes unreasonable delay, the receiver, as an officer of the court and a representative of the parties interested in the sale, that is say, the creditor, has an option to make a return to the court "no sale," and not to permit the sale to be confirmed and then to proceed to a resale and to require the first purchaser to pay any loss that might result from the price upon the resale not being as great as the price upon the first sale, or to return the sale as made, and proceed by

⁶⁵ *Thompson v. Speck*, 2 Ch. App. 579.

⁶⁶ *Koontz v. Northern Bank*, 16 Wall. 196, at 202, 21 L. ed. 465.

⁶⁷ *Heid v. Ebner* (1904), 133 Fed. 156, at 158, approved *Cowden v. Wild Goose Mining Co.* (1912), 199 Fed. 561, at 566.

civil action against the purchaser to require him to pay the purchase money, or the court might proceed by attachment in contempt proceedings to require the purchaser to comply with the conditions of his purchase.⁶⁸

The purchaser at a judicial sale becomes a party to the suit,⁶⁹ and is therefore amenable to the order of the court making the sale. He may be in contempt of court and prosecuted by the court if he fails to complete the sale or otherwise disobeys the orders of court.

Purchaser May Be Compelled to Comply with Bid. The jurisdiction of the court over purchasers at a judicial sale is well settled. From the time he enters into a contract of purchase at a judicial sale the purchaser becomes a party to the action by voluntarily submitting himself to the jurisdiction of the court, and may be compelled to comply with bid by rule in the original case.⁷⁰

If the court sets aside a sale that in itself does not rescind the purchaser's contract to purchase and release him from liability for the difference between his bid and the price at which the property may be subsequently sold.⁷¹

If the purchaser refuses after confirmation of sale to accept the property and pay for it according to the conditions of the sale and his bid, the receiver has two courses open to him: either to compel payment by action or to have the confirmation of sale set aside and to proceed to a resale of the property.⁷²

§ 633. Effect of Reversal of Decree on Purchaser's Title.

It has been held, even without a statute thereon, that the

⁶⁸ *Murphy v. Handel*, 22 Ohio C. 511, at 517. See *Commonwealth v. Electric Co.* (1910), 227 Pa. 7, 75 Atl. 851.

⁶⁹ *Deaderick v. Smith* (1845), 6 Humph. 142.

⁷⁰ *In re Matter of Charles Denison* (1889), 114 N. Y. 62, 21 N. E. 97; *Cazet v. Hubbell*, 36 N. Y. 676; *In re Attorney General v. Continental Life Ins.*, 94 N. Y. 199; *Hale v. Clauson*, 60 N. Y. 339;

Horse Springs Cattle Co. v. Schofield, 9 N. M. 136, 49 Pac. 954; *Rice v. Ahlman* (1912), 70 Wash. 12, 126 Pac. 66, cases cited.

⁷¹ *Commonwealth v. Electric Co.* (1910), 227 Pa. 10, 75 Atl. 851; *Singerly v. Swain* (1859), 33 Pa. 102; *Banes v. Gordon* (1848), 9 Pa. 426.

⁷² *Commonwealth v. Electric Co.* (1910), 227 Pa. 10, 75 Atl. 851; *Banes v. Gordon* (1848), 9 Pa. 426.

title of a purchaser at a sale under a decree made by a court of competent jurisdiction is valid, although the decree be reversed and the purchaser be a party to the suit.⁷³

Some states have a statute covering this matter.

For instance as follows: "If a judgment in satisfaction of which lands or tenements are sold be thereafter reversed, and reversal shall not defeat or affect the title of the purchaser, in such case restitution must be made by the judgment creditor of the money for which such lands or tenements were sold, with lawful interest from the day of sale."^{73a}

§ 634. Opening or Vacating Receiver's Sale—Generally. The United States Circuit Court of Appeals, Eighth District, in 1903, has declared the rules governing the opening up or vacating judicial sales to be that "at a sale by a master or receiver under an order or decree in equity which contemplates a subsequent report and confirmation of the sale, a bidder becomes a purchaser when the officer announces the sale to him. Thereafter he may be compelled to complete his purchase and pay the price which he offered. Such a sale will not before confirmation be opened for bidders, in the absence of proof of fraud or misconduct at the sale."⁷⁴

The practice of opening sales upon the offer of a secured bid of 15 per cent. advance has never prevailed in the United States federal courts. The rule there is that mere inadequacy of price, unless very great, is insufficient to warrant the opening of the sale, but that if the inadequacy be great, slight circumstances of unfairness on the part of

⁷³ Daniels Ch. Pr. 1276, note a and 2; also Gosson v. Donaldson (1857), 18 B. Mon. (Ky.) 230; Ward v. Hollins (1859), 14 Md. 158.

^{73a} General Code of Ohio, sec. 11702.

⁷⁴ Files v. Brown (1905), 124 Fed. 133; see same rule as to sale under foreclosure of mortgage, Hale v. Clauson (1875), 60 N. Y. 339, at 341. See Eastern Steel Co. v. Godair-Wimmer Bldg. Co. (1915), 223 Fed. 532, at 534, citing Laight v. Pell, 1 Ed. Ch. 577; Hudson v. N. Y. & Albany, 180 Fed. 973.

the party benefited will be sufficient to prevent its confirmation and to warrant the opening of the sale for further bids.⁷⁵

In North Carolina and some other states it is a settled rule of practice to open the sale and receive new bids upon a guarantee of an advance of 10 per cent.⁷⁶ This rule has been rejected, and now both in England and in the United States a sale will not be set aside for mere inadequacy of price, unless the inadequacy be so gross as to shock the conscience or unless there be additional circumstances against its fairness.⁷⁷

It will not be set aside for inadequacy of price unless the inadequacy is so great as to shock the conscience.⁷⁸

(a) Fraud or Misconduct of Purchaser. Fraud vitiates everything. Biddings are not to be opened up after confirmation of the sale except in peculiar circumstances. Fraud may be a cause of opening up of the bids or setting aside the sale.⁷⁹ The fraud or misconduct of the purchaser or the fraudulent negligence in another person as the agent must be such that it is against conscience for the purchaser to take advantage.⁸⁰

A sale will not be set aside after confirmation by the court except for fraud, mistake, surprise, or other cause for which equity would give relief if the sale had been made by the parties in interest instead of by the court.⁸¹

⁷⁵ *Morrison v. Burnette* (1907), 154 Fed. 617, at 624; citing *Ballentyne v. Smith*, 205 U. S. 285, 51 L. ed. 803, 27 F. C. Rep. 527; *Files v. Brown* (1903), 124 Fed. 133, at 137.

⁷⁶ *Attorney General v. Roanoke Navigation Co.*, 86 N. C. 408, at 413; *Blue v. Blue*, 79 N. C. 69; *In the Matter of Bost, et al.*, 3 Jones Eq. 482; *Wood v. Parker*, 63 N. C. 379.

⁷⁷ *Ballentyne v. Smith* (1906), 206 U. S. 285, at 290, 51 L. ed. 803.

⁷⁸ *Schroeder v. Young* (1895), 161 U. S. 334, at 337, 40 L. ed. 721; *Files v. Brown* (1903), 124 Fed. 133, at 137, citing *Graffam v. Burgess*, 117 U. S. 180, at 191, 192, 29 L. ed. 839; *Pewabic Mining Co. v. Ma-*

son, 145 U. S. 349, at 367, 36 L. ed. 732; *contra*, inadequacy of price held sufficient to have sale set aside, *In re Receivership of First Trust & Savings Bank* (1912), 122 Pac. 561, 45 Mont. 89.

⁷⁹ *Watson v. Birch*, 2 Ves. Jr. 51.

⁸⁰ *Mouce v. Bishop of Durham*, 11 Ves. 57. See *Baker v. Schofield* (1917), 243 U. S. 114, 61 L. ed. 626, 37 S. Ct. Rep. 333.

⁸¹ *Virginia Fire & Marine Ins. Co. v. Cottrell* (1889), 85 Va. 857, at 862, 9 S. E. 132; *Berlin v. Melhom*, 75 Va. 639; *Langyher v. Patterson & Bush*, 77 Va. 470; *Coles v. Coles*, 83 Va. 525, 5 S. E. 673; *Todd v. Gallego Mills*, 84 Va. 586, 5 S. E. 676.

(b) Misrepresentation by Auctioneer. The Circuit Court of Appeals, Second Circuit, has held that in a receiver's auction sale of vessels subject to maritime and state liens, the bidders were entitled to rely on statements made by the auctioneer stating the amount of such liens. The auctioneer was properly employed by the receiver and was considered by the bidders as his mouthpiece. The auctioneer made a substantial misrepresentation and a sale under such circumstances may be set aside.⁸²

§ 635. Assumption of Receiver's Obligations by Purchaser. If the purchaser of a third party had no part or interest in the operation of the property of the receiver, he is plainly not answerable for any alleged negligence by the receiver or contract entered into by the receiver which has not ripened into a lien or quasi lien on the property which the purchaser takes. If in such cases the purchaser is liable to respond to any causes in tort or contract against the receiver as such, it must be because the purchaser, by taking the property under court decree of sale, has assumed an obligation through the terms of purchase and the circumstances of succession in estate.⁸³

It is within the power of a court appointing a receiver, on terminating the receivership, to make and provide for settlement of all claims of parties against the receiver growing out of his operation of the property.⁸⁴ Such a court may properly by its order make such a provision by directing that all claims against the receiver should be presented and prosecuted by intervention or otherwise prior to a certain date, and that if not so presented by that date, that such claims be barred.⁸⁵

⁸² Hudson v. New York & Albany Transp. Co. (1910), 180 Fed. 973.

⁸³ Gray v. Grand Trunk Western Ry. Co. (1907), 156 Fed. 736, at 741, 743; Mendenhall v. Chicago G. W. Ry. Co. (1912), 135 N. W. 620, 155 Iowa 236; Burgess v. Peth (1914), 140 Pac. 351, 79 Wash. 298; Willson v. Colorado & S. Ry.

(1914), 142 Pac. 174, 57 Colo. 303.

⁸⁴ Texas & Pacific Ry. Co. v. Bloom (1896), 164 U. S. 636, at 639, 41 L. ed. 580.

⁸⁵ Texas & Pacific Ry. Co. v. Bloom (1896), 164 U. S. 636, at 639, 41 L. ed. 580, 17 S. C. Rep. 216.

If property under such circumstances goes to judicial sale and a fund realized, then upon notice appropriate to proceedings in rem, such a claimant would, in the absence of special and unusual circumstances, be bound by the disposition of the property so made.⁸⁶

When the court makes a decree selling property which is in the receiver's hands, the court may make this sale conditional on the purchaser assuming certain obligations and agreeing to pay the same, such as those growing out of the receivership management.⁸⁷ The court in making the sale may reserve to itself the right to retake such property and resell the same in the event the purchaser shall fail to pay such obligations after they are finally established.⁸⁸

In such a case the purchaser may intervene or enter its appearance in the main action or in any action pending in any other court in which it is sought to establish a claim against the receivers when such claims were assumed by the purchaser, and the purchaser, when he has intervened, may contest such claims and may appeal from any decision against him relating thereto.⁸⁹

After the termination of a receivership by court decree and the transfer of property and funds to a purchaser or other party, a suit at law is not maintainable against the receiver as such, his official liability is at an end.⁹⁰

§ 636. Assumption of Receiver's Obligations by Original Owner. There are cases where the property in the hands of

⁸⁶ *Texas & Pacific Ry. Co. v. Bloom* (1896), 164 U. S. 636, at 639, 41 L. ed. 580. See *United States & Mexico T. Co. v. Kansas City M. & O. Ry.* (1917), 240 Fed. 505.

⁸⁷ *Hanlon v. Smith* (1909), 175 Fed. 192. See *Atchison, T. & S. F. Ry. v. Osborn* (1906), 148 Fed. 606.

⁸⁸ *Hanlon v. Smith* (1909), 175 Fed. 192, at 198.

⁸⁹ *Hanlon v. Smith* (1909), 175 Fed. 192, at 199.

⁹⁰ *Gray v. Grand Trunk Western Ry. Co.* (1907), 156 Fed. 736, at

743; *McNulta v. Lochridge* (1901), 141 U. S. 327, at 332, 35 L. ed. 796; *Archambeau v. Platt* (1899), 173 Mass. 249, at 251, 53 N. E. 816; *Brewing Company v. Betts* (1906), 28 O. C. C. 484, citing *Davis v. Duncan*, 19 Fed. 477; *Farmers Loan & Trust Co. v. Central R. R. of Iowa*, 2 McCrary 181, at 186, 7 Fed. 537, at 542; *Lehman v. McQuown*, 31 Fed. 138, at 140. See *Reynolds v. Stockton*, 140 U. S. 254, at 272, 35 L. ed. 464, 11 S. C. Rep. 773.

the receiver is returned to the original owner. In such a case the United States Supreme Court has held:⁹¹ "Where the claim was incidental to the ordinary management of the railroad not attributable to personal misconduct of the receiver, and where the court which had appointed the receiver had not been put in possession of a fund by a foreclosure sale, but had at the request of the company and its mortgage creditors restored its property to the railroad company while such claim was pending, we are unable to concede that an order of that kind that was made in this case precluded the plaintiff from enforcing her claim."⁹²

State statutes as well as equitable principles may determine whether or not the original owner⁹³ or the purchaser⁹⁴ is liable for the obligations of the receiver as such.

The Court of Civil Appeals of Texas lays down the rule as follows: "Independently of the statute (Texas Revised Statutes, 1895, art. 1472), the rule seems to be established that the owner receiving back his property without sale can only be made responsible for the liabilities incurred by the receiver when it is shown that the revenues of the property while in the hands of the receiver had been expended in betterments."⁹⁵

§ 637. Receiver Can Not Sell to Himself. A trustee or receiver is not allowed to unite the two characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the

⁹¹ Mr. Justice Shiras, in *Texas & Pacific Railway Company v. Bloom* (1896), 164 U. S. 636, at 640, 41 L. ed. 580.

⁹² *Texas & Pacific Ry. Co. v. Bloom* (1896), 164 U. S. 636, at 640; similar case, *Bartlett v. Cicero Light Co.* (1898), 177 Ill. 68, at 73, 52 N. E. 339; *Thompson v. Northern Pac. Ry.*, 93 Fed. 384; *Texas & P. Ry. v. Comstock*, 83 Tex. 537, 18 S. W. 946; *Boggs & Bro. v. Brown*, 82 Tex. 41, 17 S. W. 830; *Texas & Pac. Ry. v. Johnson*, 76

Tex. 421, 13 S. W. 463; *Brown v. Gay*, 76 Tex. 444, 13 S. W. 472.

⁹³ *Texas & Pac. Ry. Co. v. Bloom* (1893), 151 U. S. 81, at 99, 41 L. ed. 580.

⁹⁴ *Gray v. Grand Trunk v. W. Ry.* (1907), 156 Fed. 736, at 744; *Kirby Lumber Co. v. Cunningham* (1913), 154 S. W. 288, *Tex. Civ. App.*

⁹⁵ *Kirby Lumber Co. v. Cunningham* (1913), 154 S. W. 288, *Tex. Civ. App.*

person on whose account he buys or sells.⁹⁶ When one's relation to a transaction is a trust relation, as is a receiver's, it is his duty to do everything for the benefit of his *cestuis que trustent*.⁹⁷ A receiver appointed to hold property during litigation could not use the knowledge obtained by him as receiver to buy in a paramount title and set it up against the person who turns out to be the true owner on the conclusion of the litigation in question.⁹⁸

If a trustee buys trust property even at a public sale which it brought about or in any way controlled, the trustee will be presumed to buy and hold for the benefit of the trust.⁹⁹

Sales made by a receiver to himself, or to his wife, or to a corporation in which he is a stockholder and director, are contrary to public policy and voidable at the election and instigation of one having a beneficial interest in the property.¹ The party complaining must in all cases act promptly and before the act of which he complains has become the basis of rights or equities which would be greatly impaired if the transaction be set aside.²

When a receiver sells receivership property to a firm of which he is a member, the relations between the buyer and seller demand the production of clear and positive proof that the full market price of the property was received.³

Exceptions to the Rule. Where the trustee has no control over or is not instrumental in bringing about a sale of the property, it has been held that he may bid and become the purchaser of the property free from any trust upon his part.⁴

⁹⁶ *Michoud v. Girod*, 4 How. 503; *McCourt v. Singers-Bigger* (1906), 145 Fed. 103.

⁹⁷ *Strang v. Edson* (1912), 198 Fed. 813. See *New Britain Mach. Co. v. Watt* (1915), 180 S. W. 624, Tex. Civ. App.

⁹⁸ *Halman v. Burlew* (1908), 198 Mass. 494, at 499, 85 N. E. 167.

⁹⁹ *Church v. Winton*, 196 Pa. 107, 46 Atl. 363.

¹ *South Georgia Bldg. & Inv. Co. v. Matthews* (1910), 67 S. E. 127, 7 Ga. A. 452, citing 9 Ga. 164, 46 Ga. 478, 111 Ga. 136; brother of

receiver allowed to buy, *L. Luderback Plumbing Co., Ltd., v. Its Creditors* (1908), 121 La. 371, 46 So. 359.

² *Strang v. Edson* (1912), 198 Fed. 813, at 818; *Baker v. Schofield* (1917), 243 U. S. 114, 61 L. ed. 626, 37 S. Ct. Rep. 333.

³ In *re Receivership of Dugdamonia Shingle & Lumber Co., Ltd.* (1907), 118 La. 242, 42 So. 789.

⁴ *Calvert v. Wood's appellant* (1914), 246 Pa. 325, at 328, 92 Atl. 301; *Lust's Appeal*, 108 Pa. 152; *Fisk v. Sarber*, 6 W. & S. 18.

§ 638. Collusion between Receiver and Defendant or Purchaser. If it is shown that there has been collusion between the receiver and the defendant and that the sale was for a grossly inadequate price, and that for some good and sufficient reason an interested party was not present at the confirmation of the sale, and that the grossly inadequate price was, by reason of the collusion between the receiver and the purchaser, then the court may properly set aside the sale, even after its confirmation.⁵

A purchaser is bound to examine beforehand the title of the property put up for sale by a receiver.⁶ "The court, however, treats a contract made with one of its officers as being made with the court itself and will deal with the contractee upon equitable principles."⁷

§ 639. Liens Affected by Receiver's Sale of Property. A purchaser at a receiver's sale takes the property subject to all subsisting paramount liens,⁸ and such liens are not divested or affected by such a sale as against strangers to the record. Even if the decree directs the receiver to sell property free of incumbrances, the sale can not cut off the rights of incumbrances of parties who have not been served and who have not appeared in the case.⁹

See sale by receiver to himself, upheld in Kentucky, *Williams v. Owensboro Sav. Bk. & T. Co.* (1913), 153 Ky. 789, 156 S. W. 899.

⁵ *Dilley v. Jasper Lumber Co.* (1909), 122 S. W. 255, 103 Tex. 22.

⁶ *People v. New York, B. L. Banking Co.* (1907), 189 N. Y. 233, at 237, 82 N. E. 184; *Campbell v. Parker*, 59 N. J. Eq. 342, 45 Atl. 116; 5 *Pomeroy's Equity Jurisprudence*, sec. 212.

⁷ *Campbell v. Parker*, 59 N. J. Eq. 342, 45 Atl. 116. See *Etheridge v. Vernoy* (1879), 80 N. C. 78.

⁸ *People v. New York, B. L. Banking Co.* (1907), 189 N. Y. 233, at 237, 82 N. E. 184; *Matter of Coleman*, 174 N. Y. 373; *Black v. Manhattan Trust Co.* (1914), 213 Fed. 692.

⁹ *Black v. Manhattan Trust Co.* (1914), 213 Fed. 692.

CHAPTER XXV

PLEADING, PRACTICE AND PROCEDURE

ANALYSIS

- § 640. Effect of Judicial Code of the United States on Receivership Practice.
- § 641. Effect of English Judicature Act on Receivership Practice.
- § 642. Effect of Chancery State Statutes on Receivership Practice.
- § 643. Effect of Code State Statutes on Receivership Practice.
- § 644. Suit Must Be Pending.
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 - (f) Procedure by Secured Creditors.
 - (g) Procedure by Stockholders of Corporations.

§ 640. Effect of Judicial Code of the United States on Receivership Practice. See ch. XXXII. Vol. II. *infra*.

§ 641. Effect of English Judicature Act on Receivership Practice. See ch. XXXII, Vol. II, *infra*.

§ 642. Effect of Chancery State Statutes on Receivership Practice. See ch. XXXII, Vol. II, *infra*.

§ 643. Effect of Code State Statutes on Receivership Practice. See ch. XXXII, Vol. II, *infra*.

§ 644. Suit Must Be Pending. The application for a receiver is an interlocutory proceeding in a pending suit.¹ An order appointing a receiver made at chambers, like an order allowing an injunction or other interlocutory order, presupposes a pending suit.²

All applications for a receiver must be in adversary proceedings, with a few exceptions. If, in an ordinary case, a receiver were appointed over property without a controversy involved and some ultimate relief asked for, the court might find itself in the position of a mere custodian called upon to do the ministerial act of caring for the property. A judicial function is to hear and determine a controversy between adverse parties to ascertain the facts and to render a final judgment.³ Preserving property is only incidental to this primary judicial function.

When there is no controversy involved and when there is no cause for an adversary proceeding, but all parties having an interest in certain property or funds are united in desiring a third indifferent party to be put in charge thereof, there is no judicial function to hear and determine a controversy between adverse parties to ascertain the facts and applying the law to the facts to render a final judgment. Therefore, in such a case, if there is no controversy, the parties can voluntarily, by deed of trust *inter vivos*, or by will, make a third party

¹ *Pressley v. Harrison* (1884), 102 Ind. 19; *In re Brant* (1899), 96 Fed. 257.

² *Horn v. Pere Marquette Ry. Co.* (1907), 151 Fed. 626.

³ *Fairview v. Giffie* (1905), 73 O. S. 183, 76 N. E. 865.

trustee to hold property or fund and prescribe such powers and duties for the trustee as are not contrary to law.

Appointment in Ex Parte Proceeding. In England chancery courts take charge of property of infants, idiots, etc., in ex parte proceedings whether or not there is any controversy involved.⁴ In the United States generally probate courts take the place of such chancery court and under statutes appoint guardians, etc., sometimes in ex parte proceedings.⁵

§ 645. When Suit Is Commenced. The commencement of an action is the filing of a petition and causing summons to issue.⁶ The issuing of summons means the transfer of the summons to the sheriff, the writ having passed out of the hands of the clerk who issued it.⁷ If the adverse party voluntarily appears to an action and files his answer without process and submits to the same, the court or judge in vacation acquires full and complete jurisdiction both of the subject-matter of the action and the persons of the parties, such voluntary appearance being equivalent to the service of process.⁸

§ 646. Party in Possession Necessary Party to Suit. A suit being necessary upon which to predicate a receivership and the court taking property out of the custody of someone, it naturally follows that such one shall be made a party to the suit and be given an opportunity to resist the application for a receivership⁹ and to otherwise protect his rights. Ordinarily, as in other suits, service should be had on the defendant or his appearance voluntarily entered, yet when the defendant has had actual notice, although not served or not having entered his appearance, a receiver may be appointed to carry on an

⁴ See ch. VI, *infra*, "Receivers of Estate."

⁵ See ch. VI, *infra*, "Receivers of Estate."

⁶ *Dixon v. Dixon* (1912), 119 Md. 413, at 414, 86 Atl. 1042; *Zieverink v. Kemper* (1893), 50 O. S. 208, 34 N. E. 250; *Bowen v. Bowen* (1880), 36 O. S. 312; *Siebert v. Switzer* (1880), 35 O. S. 661.

⁷ *Hower v. Seiberling* (1894), 2 Ohio N. P. 8, at 12; *Marshall v. Matson* (1908), 86 N. E. 339, 171 Ind. 238.

⁸ *Pressley v. Lamb* (1885), 105 Ind. 171, at 187, 4 N. E. 682.

⁹ *Baker v. Administrator of Backus* (1863), 32 Ill. 79.

action which could have been otherwise barred by statute of limitations.¹⁰ It has also been held that a court may appoint a receiver prior to the service of process upon the defendant to the creditor's bill, such appointment being dependent upon the defendant being at some time brought into the suit by appearance or service of process.¹¹

§ 647. Initiatory Proceedings for Appointment of Receiver.

Since a pendente lite receivership is predicated upon a main suit, this main suit must first be brought and be pending before a receiver can be appointed.¹² This main suit must be an adversary suit except when ex parte, as referred to in sec. 644, supra, and to be an adversary suit there must be, among other things, a cause of action stated and some ultimate relief prayed for. The appointment of a receiver is an interlocutory order¹³ and not a final order. The ultimate relief prayed for must be something which can be accomplished by a final order. The appointment of a receiver may be prayed for in the original petition, but it must be provisional to and ancillary to the final relief prayed for.

§ 648. Receiver Appointed on Court's Own Motion. The appointment of a receiver is a remedy applied by court and is not an absolute right of a litigant. The appointment of a receiver is discretionary with the court. While a receiver is ordinarily appointed at the instance of the plaintiff who brings the main suit, nevertheless a receiver may and is sometimes appointed on the court's own motion or suo motu without application by either party.¹⁴ In some states the statutes pro-

¹⁰ Hazard v. Credit M. (1855), 8 Fed. Cas. No. 4590.

¹¹ Russell v. Chicago T. & S. B. (1890), 40 Ill. App. 385.

¹² Pressley v. Harrison (1884), 102 Ind. 14, at 19, 1 N. E. 188; In re Brant (1897), 96 Fed. 257.

¹³ Teaff v. Hewitt (1853), 1 O. S. 511; Horn v. Pere Marquette Ry. (1907), 151 Fed. 626.

¹⁴ Elk Ford Oil & Gas Co. v. Fos-

ter (1900), 99 Fed. 495; Crawford v. Crawford (1913), 163 S. W. 115; Daniell Ch. Pl. & Pr., 1426; Gray v. Council of Town (1911), 9 Del. Ch. 171, 79 Atl. 735; McGarrach v. Bank (1903), 117 Ga. 556, 49 S. E. 987; Waters-Pierce Oil Co. v. State (1907), 105 S. W. 851, Tex. Civ. App.; San Antonio Gas Co. v. State, 22 Tex. Civ. App. 118, 54 S. W. 289.

vide expressly for the appointment of a receiver in certain cases on the court's own motion.¹⁵

§ 649. Motion for Receiver by Complainant or Plaintiff.

Since the appointment of a receiver is a provisional remedy and since it is granted after the suit is pending (even if it is prayed for in the original petition), the application for the order should be made by a motion signed by the plaintiff or his attorney.

Notice should be given to the defendant of the time set down for hearing this motion unless some reason is shown why the matter should be heard and a receiver appointed without notice.¹⁶

Such motion may even be heard and a receiver appointed before service on the defendant and before answer put in.¹⁷

§ 650. Motion for Receiver by Defendant Rare. Under the old English practice if a defendant required a receiver against the plaintiff he must file a crossbill.¹⁸ However, in England since the Judicature Act of 1873, the practice seems to be more liberal.

Under sec. 25, subsec. 8, which gives power to grant an injunction or appoint a receiver by interlocutory order "in all cases in which it shall appear to the court to be just or convenient that such order should be made," also by sec. 25, subsec. 7, which gives full power to the court to grant all remedies which any of the parties may appear to be entitled to in order to determine all matters in controversy between the parties and to avoid multiplicity of proceedings. The defendant may in some cases move for an injunction or a receiver against the plaintiff without filing a counterclaim or

¹⁵ *Baker v. Baker* (1908), 70 Atl. 418, 108 Md. 269; construing Maryland Code Pub. Gen. Laws of 1904, art. 16. See 190-194.

¹⁶ *Joseph Dry Goods Co. v. Hecht* (1903), 120 Fed. 760; also *Moore Fin. Co. v. Pressing* (1897), 71 Ill. App. 666.

¹⁷ *Brick Co. v. Robinson* (1880), 55 Md. 410; *Key v. Directors of North River Bank* (1822), 6 Johns. Ch. 160.

¹⁸ *Robinson v. Hadley* (1849), 11 Beav. 614.

issuing a writ in a cross-action but only in cases where the defendant's claim to relief arises out of the plaintiff's cause of action or is incidental to it.¹⁹ But if the relief asked by the defendant is not connected with the subject-matter of the plaintiff's claim, and relates to nothing that is the issue in the plaintiff's action but is outside of the action altogether then the defendant can not move for an injunction (or a receiver), without a counterclaim or a new suit. It may be that there being no statement of claim, he is not in a position to put in a counterclaim, in that case, if time is important to him, he must issue a writ.²⁰

In the United States courts we have not adopted the English Judicature Act in fact, but the rules in equity have become much more liberal than formerly, especially by the rules of February, 1912, printed in 222 U. S. —. In state courts the civil codes have granted a most liberal practice. The reasoning of the English decisions just cited would seem to permit the American courts to follow the decisions just cited even without the English Judiciary Act of 1873 in force here.

§ 651. Rules Governing the Appointment of Receiver. The following general rules²¹ may be laid down governing the appointment by a court of a receiver:

First. That the power of appointment is a delicate one, and to be exercised with great circumspection.

Second. That it must appear that the party moving for a receiver has a title to the property or a lien on the property or such an equitable or legal interest in the property as the rules and usages of equity or the statutes enable a court to protect by the extraordinary remedy of the appointment of a receiver.

¹⁹ Sargeant v. Read (1876), 1 Ch. D. 600; Porter v. Lopes (1877), 7 Ch. D. 358.

²⁰ Carter v. Fey (1894), 2 Ch. D. 541.

²¹ Adopted in part but not in toto from statement of Le Grand, C. J., of Court of Appeals of Maryland, *Blondheim v. Moore* (1857), 11 Md. Rep. 365, at 374. See also *Baker v. Baker* (1908), 108 Md. 269, 70 Atl. 418.

Third. A court of equity will not appoint a receiver on demand of one alleging to hold the legal title as against the party in actual possession of the real estate²² with few exceptions²³ because such a claimant to the legal title has a full and adequate remedy at law.

Fourth. The appointing court must be satisfied by affidavit or other suitable evidence that a receiver is necessary to preserve the property or in exceptional cases administer the property.

Fifth. That there is no case in which the court appoints a receiver merely because the measure can do no harm and consent of the parties can not confer jurisdiction on the court to appoint where without consent it has not the power.

Sixth. That fraud or immediate danger if the intermediate or final possession should not be taken by the court must be clearly proved.

Seventh. That unless the necessity be of the most stringent character, the court will not appoint until the defendant is first heard in response to the application.

§ 652. Appointment of Receiver Is an Order of Court. Since a receiver is an officer²⁴ of the court, an arm²⁵ of the court and since he acts for the court he can only do this by reason of authority given him by the court whose officer he is. This indicia of power or appointing is generally put in the shape of an order and since the courts in most states speak through their minutes²⁶ this order should be spread upon the minutes of the court at the earliest moment.

§ 653. Time of Appointment. A receiver may be appointed at any time while the suit is pending. Usually the reason for

²² Clark v. Dew, 1 R. & M. 103; Bainbridge v. Baddeley, 3 Mac. & G. 420; Huguenin v. Basley, 13 Ves. 105; Lloyd v. Passingham, 16 Ves. 59; Stillwell v. Wilkins, Jac. (1821), 282.

²³ Brooke v. Tucker (1907), 149 Ala. 96, 43 So. 141.

²⁴ Stuart v. Boulware (1889), 133 U. S. 78, 33 L. ed. 568, 10 S. C. Rep. 242.

²⁵ Coy v. Title Guarantee & T. Co. (1912), 198 Fed. 275.

²⁶ State v. Judges (1835), 7 Ohio, p. 1, 134.

the appointment of the receiver is apparent at the very beginning of the suit.²⁷ Ordinarily a receiver will not be appointed before answer of defendant. This was the rule. In fact, by the ancient practice of the court of chancery in England, a receiver was not appointed until after the coming in of the defendant's answer.²⁸

However, now it appears to be well settled, both in the United States and England, that a receiver may be appointed before answer, provided the complainant can satisfy the court that he has an equitable claim to the property, and that a receiver is necessary to preserve the same.²⁹

§ 654. Affidavit in Order to Appoint Receiver before Answer.

The court must be satisfied by affidavit, or other evidence, that a receiver is necessary to preserve the property.³⁰ Fraud or imminent danger must be clearly proved and unless the necessity be of the most stringent character the court will not appoint until the defendant be heard in response to the application.³¹ Nothing but the necessity of the case—such as the danger of irreparable loss—can justify a departure from the rule of common justice³² that a party shall be heard before property is taken from his custody.

It has been held that a court is authorized to grant the prayer for a receiver upon affidavit of the plaintiff notwithstanding the defendant by affidavit denies generally each and all of the allegations of the petition.³³

Sufficiency of Affidavit when Receiver Appointed without Notice. An affidavit that the statements in an application for a receiver or for a temporary restraining order without notice and like application are true to the best of the knowledge and

²⁷ *Horn v. Pere Marquette*, 151 Fed. 626.

²⁸ *Bloodgood v. Clark* (1834), 4 Paige (N. Y.) 574.

²⁹ *In re Potts* (1893), 1 Q. B. 662; *Nartzik v. Ehman* (1914), 191 Ill. App. 71, at 80.

³⁰ *Virginia-Carolina Chemical Company v. Hunter* (1909), 84 S. C. 214, 66 S. E. 177; *Rappaport v.*

Otten (1909), 120 N. Y. S. 461.

³¹ *Brick Co. v. Robinson* (1880), 55 Md. 410; *Albritton v. Lott-Blacksher* (1910), 167 Ala. 541, 52 So. 653.

³² *Kep. v. Directors of North River Bank* (1822), 6 Johns. Ch. 160.

³³ *Shaw v. Shaw* (1908), 112 S. W. 124, Tex. Civ. App.

belief of the affiant, or to the best of his information and belief is insufficient and is not admissible in evidence at the hearing of such application. Such application or petition to be admissible evidence must be verified in positive terms.³⁴

§ 655. Receiver Sometimes Appointed before Notice. It is not doubted that a court of equity should appoint a receiver not only before answer but sometimes without notice to the defendant where an emergency exists which calls for such action. But notice should be given and the defendant furnished an opportunity to be heard, except in cases of imperious necessity requiring immediate action by the court and where protection can not be afforded the plaintiff in any other way.³⁵

When the court is asked to depart from the usual practice of requiring notice, a full, frank and complete disclosure of all the facts relevant to the question should be made to the court.³⁶

“Appointment of a general receiver of the assets of a corporation, or a copartnership, or an individual, carrying on an active business in which the maintenance of the credit of the respondent is a necessary element is quite equivalent to an execution before judgment and means, ordinarily, financial ruin.”³⁷

³⁴ *Henderson v. Reynolds* (1907), 168 Ind. 522, 81 N. E. 494; *Siegmund v. Ascher*, 37 Ill. App. 122; *Nusbaum v. Locke* (1893), 53 Ill. App. 242, at 244; *Grandin v. La Bar* (1891), 2 N. D. 206, at 213-216; *New South Bldg. Assn. v. Willingham* (1893), 93 Ga. 218, 18 S. E. 435; *Cofer v. Echereson* (1858), 6 Iowa 502; *French v. Gofford* (1870), 30 Iowa 148, at 161; *Verplanck v. Mercantile Ins. Co.* (1831), 2 Paige 450; *Burgess v. Martin* (1895), 111 Ala. 656, 20 So. 506.

³⁵ *Huff v. Bidwell* (1907), 151 Fed. 563, at 565; *Weis v. Goetter* (1882), 72 Ala. 259; *Joseph Dry Goods Co. v. Hecht*, 120 Fed. 760; *Hendrix v. American, etc.*, 95 Ala. 313, 11 So. 313; *Deville v. Hinde* (1897), 18 Ohio C. C. 618; *Grandin*

v. La Bar, 2 N. D. 206, 50 N. W. 151; *Joyce v. Ragan* (1911), 117 Md. 38, 82 Atl. 992; *Schmidt v. Johnson* (1912), 166 Ill. App. 623; *Baltimore Tr. Co. v. Georges Creek C. Co.* (1912), 119 Md. 23, 85 Atl. 949; *Taylor v. Easton* (1910), 180 Fed. 363; *Henderson v. Reynolds* (1907), 168 Ind. 522, 81 N. E. 494, 11 L. R. A. (N.S.) 960; *Anderson v. Robinson* (1912), 63 Or. 228, 126 Pac. 988.

³⁶ *Burroughs v. Toscaway Co.* (1910), 182 Fed. 129; *Lamm v. Burrell*, 69 Md. 272, 14 Atl. 682; *Baker v. Baker* (1908), 108 Md. 269 70 Atl. 418, at 420; *Johnson v. Lipert*, 96 Md. 584, 54 Atl. 114.

³⁷ *Haight v. Freeze Co.* (1907), 156 Fed. 328; *Lloyd's Bk., Ltd.* (1905), C. A. 11 K. B. 361.

Since equity acts in person and since the appointment of a receiver is an equitable proceeding, and since equity acts indirectly and not directly against the property, it is difficult to see how a receiver can be appointed except when the defendant has been served. If this can be done, and cases may present themselves wherein a receiver must be appointed before service of the defendant, it is done on the same principle that an injunction will sometimes issue before actual service and sometimes even before actual notice made. It must appear that such relief and protection can be given in no other way. When notice can be given it should be given unless there is imminent danger of loss or great damage, or irreparable injury or the greatest emergency or when by the giving of notice the very purpose of the appointment of a receiver would be rendered nugatory. And such instances are rare in the federal courts, because of their power, when an injunction is asked for to grant a temporary restraining order (United States Revised Statutes, sec. 718), which may be served at the same time that the notice is served, to prevent action by the defendant or his agent and to preserve the existing conditions until the application for a permanent injunction and for a receiver can be heard.³⁸

Some state statutes provide for notice to be given before a receiver may be appointed.³⁹ Some statutes permit a receiver under extraordinary circumstances without notice.⁴⁰ The exceptional circumstances generally meant are exceptional cases which sometimes occur and which make it necessary that the court should appoint a receiver without notice to the defendant. Such emergency may be the absence of the defendant from the jurisdiction of the court or failure to find the defendant or some other emergency rendering the action of the court necessary to prevent waste, distinction or loss.⁴¹

³⁸ South American L. & T. Co. v. Watkins (1901), 109 Fed. 101, at 106; Ford v. Taylor (1905), 137 Fed. 150.

³⁹ New York Civil Code, sec. 714, et seq.

⁴⁰ Civil Code of Georgia (1895), sec. 9904; New York Civil Code, sec. 714, et seq.

⁴¹ Mann v. Gaddie (1907), 158 Fed. 42, at 44.

Revised Statutes of Illinois, 1911, page 167, sec. 22, ch. 52, R. S., require a bond, except upon notice and full hearing.—*John Spry L. Co. v. Hardin* (1912), 172 Ill. App. 86. Error to appoint a receiver without a bond by complainant unless the order of appointment contained a statement or finding that a receiver ought to be appointed without such bond.⁴²

The Supreme Court of Illinois has said, "Where the appointment of a receiver is merely incidental to the main object of the bill, the defendant is entitled to notice of the application though in default to the complainant unless complainant gives the bond required by statute ⁴³ therein provided."⁴⁴

The section of the Nebraska Civil Code of Procedure (sec. 274, Compiled Statutes of Nebraska, 1911), relative to notice in the case of the appointment of a receiver is as follows: "Every order appointing a receiver without notice provided for herein shall be void and every order heretofore made, under which the appointee has not possessed himself of the property in question, shall be suspended until an order shall have been made and the bonds executed and filed in accordance with the provisions of this chapter."⁴⁵

The Supreme Court of Nebraska commenting on this statute says, "The notice of the hearing of an application for the appointment of a receiver is by this statute made jurisdictional, and it requires neither argument nor citation of authorities to show that the notice must state the time and place where the hearing will be had, and that the hearing must be upon that date. If the court attempts to adjudicate the question at an earlier date than that specified in the notice its action is wholly void."

⁴² *Strayer v. Gillespie* (1913), 177 Ill. App. 97; *Watson v. Cudney*, 144 Ill. App. 624; *Starr v. Moytong*, 145 Ill. App. 341; *Ayres v. Graham*, 150 Ill. App. 137; *Aevermann v. Rizek*, 160 Ill. App. 648; *Mason v. Hooper*, 166 Ill. App. 537.

⁴³ *Hurd's Stat. of Ill.* (1903), ch. 23, sec. 53.

⁴⁴ *Rice Co. v. McJohn* (1910), 244 Ill. 264, at 272, 91 N. E. 448.

⁴⁵ *Gibson v. Sexton* (1908), 82 Neb. 475, 118 N. W. 77.

The statutes of California, sec. 566, Code of Civil Procedure, provide as follows: "If a receiver is appointed upon an *ex parte* application, the court, before making the order, must require from the applicant, an undertaking, with sufficient sureties in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; and the court may in its discretion at any time after said appointment require additional undertaking."

The Supreme Court of California has said: "The purpose of this clause was to provide security to each defendant for the recovery of any damages he might suffer from the appointment of a receiver procured wrongfully, or without sufficient cause. The undertaking should, therefore, be in such form that any defendant would have a right of action thereon if he is damaged by the appointment."⁴⁶

The courts of the state of Washington, whose statutes are silent as to notice being necessary before a court may appoint a receiver, have held "that the appointment of a receiver without notice, and without limiting the appointment to a day certain fixed by the court, upon which the parties adversely affected by the appointment could appear and contest the appointment is without jurisdiction and void."⁴⁷

A circuit court of the United States in the absence of statute requiring notice of application for the appointment of a receiver in the exercise of judicial discretion may appoint a receiver without notice, such appointment being subject only to direct attack or abuse of discretion.⁴⁸ To take a defend-

⁴⁶ Title Insurance Co. v. California Dev. Co. (1912), 164 Cal. 58, 127 Pac. 502.

⁴⁷ State, ex rel. Ridgeley, v. Superior Court (1915), 86 Wash. 584, at 587, 150 Pac. 1153, citing *Laison v. Winder*, 14 Wash. 109, 44 Pac. 123; *Cole v. Price*, 22 Wash. 18, 60

Pac. 153; *State, ex rel. Washington Match Co., v. Superior Court*, 34 Wash. 123, 74 Pac. 1070; *Libert v. Unfried*, 47 Wash. 182, 91 Pac. 774, 91 Pac. 776.

⁴⁸ *Taylor v. Easton* (1910), 180 Fed. 363.

ant's property out of his possession and control after notice to him and after a hearing in advance of a final trial and place it in the hands of a receiver, is a jurisdiction that should be exercised with great care and with studious effort to avoid mistake and oppression and to deprive him of the possession of his property without notice, on the motion of his adversary, is a jurisdiction and power that should be rarely used and never except in a clear case of imperious necessity, when the right of the complainant on a showing.

When the property sought to be reached by a creditor's bill was of a kind easily put out of reach and where, had an injunction been issued, it would have been very difficult to prove a breach, had one been committed, it has been held that the only way to make sure that the complainant, if entitled to relief, would get it, was to put the source of relief into the custody of the law, and approve the appointment of a receiver, without notice, under the particular circumstance.⁴⁹

When it is shown that if by giving notice to the defendant of the application for a receiver, he will move the property beyond the jurisdiction of the court, a receiver may well be appointed without notice to the defendant.⁵⁰

§ 656. Appointment before Notice against Property of Non-resident. "A receiver may be appointed when a suit is pending." When a suit is pending against a nonresident, no actual service within the state is possible. It is sometimes impossible, in such cases, to notify the defendant at all, and the property may be in danger of being removed beyond the jurisdiction of the court or otherwise lost.⁵¹ The appointment of a receiver without notice to the defendant may be made when good grounds are shown for such action, and it is not necessary that a specific finding of the particular facts justifying such action by the court should affirmatively appear in

⁴⁹ Moore Furnace Co. v. Prussing (1897), 71 Ill. App. 666, 180 Ala 343.

⁵⁰ Wright v. Wright (1913), 180 Ala. 343, 60 So. 931.

⁵¹ Railway Co. v. Jewett (1882), 37 Ohio St. 649.

the order or upon the journal.⁵² The case *Dwelle v. Hinde*, noted below, is an example of an equity court acting on personal property and certain equitable interests of the defendant in the county—a species of proceedings in rem although equity ordinarily acts in personam. Property is not taken without due process of law because it is held by the court subject to the final determination of the cause, which must be only after fair opportunity is given to the defendant to be heard.

§ 657. Estoppel and Waiver Validating Appointment. It has been held that consent will not authorize a court to appoint a receiver in a case in which the appointment would be otherwise improper, but it has been held that stockholders who recognize a receiver by intervening in the suit in which he is appointed and asking that he be authorized to sell certain assets can not afterwards question his appointment.⁵³

When a statute expressly prohibits persons interested in the subject of the litigation from being appointed receiver and a party consents to the appointment of an interested person, he can not complain of such appointment nor object to compensation being allowed such an interested person.⁵⁴

The insistence that a receiver was prematurely appointed because appointed by the register before answer to the bill was filed, if tenable in the outset, loses its efficacy by the filing of the answer and the lodging it with the chancellor to be considered along with the affidavits submitted to him.⁵⁵

Mere failure to appear and contest does not preclude party from asserting the invalidity of the appointment.⁵⁶

A party who intervenes in a receivership proceeding with knowledge of the collusiveness of the institution and conduct

⁵² *Dwelle v. Hinde* (1897), 18 Ohio C. C. 618.

⁵³ *Kreitzer v. Chemical Co.* (1914), 92 Kan. 835, 141 Pac. 1004; *Face v. Hall* (1914), 183 Mich. 22, 148 N. W. 777.

⁵⁴ *East Tennessee T. & Co. v. Watson* (1912), 147 Ky. 462, 144 S. W. 375.

⁵⁵ *Brooke v. Tucker* (1907), 149 Ala. 96, 43 So. 141.

⁵⁶ *Albritton v. Lott-Blacksher* (1910), 167 Ala. 541, 52 So. 653.

of such proceedings can not thereafter attack the appointment on that ground.⁵⁷

If a creditor sues both the receiver and the company defendant in a lien case, he thereby recognizes the validity of the decree appointing the receiver.⁵⁸

§ 658. Waiver of Objection to Ex Parte Appointment of Receiver. It has been held that "a defendant may be held to have waived any objection to an ex parte appointment of a receiver by acquiescence therein, by failure to interpose a timely objection, or by consenting to the appointment or by participating in the proceedings thereafter."⁵⁹

It must be said, nevertheless, that such waiver could not in an improper case bestow jurisdiction on the court to appoint a receiver.

§ 659. Appointment at the Discretion of the Judge or Chancellor. The court looks to the security and preservation of the property and ought not to interfere pending the litigation when the plaintiff's right is not perfectly clear and the property itself or the income arising from it is shown to be in danger.⁶⁰ Without some fact to establish that the alleged fund or property is in danger there is no principle of law or any established practice which authorizes a party to invoke the power of a court to apply the provisional remedy of receivership and thus transfer money or property from one person with whom it is entirely safe to a receiver.⁶¹

In all cases, therefore, where the court interferes by appointing a receiver of property in the possession of the defendant before the title of the defendant is established by decree it exercises a discretion governed by all the circumstances of

⁵⁷ *Dilley v. Jasper L. Co.* (1909), 114 S. W. 878, Tex. Civ. App.

⁵⁸ *State v. Shelton* (1911), 142 S. W. 417, 238 Mo. 281.

⁵⁹ *Anderson v. Robinson* (1912), 126 Pac. 988, 63 Or. 228.

⁶⁰ *Willis v. Corlies* (1835), 2 Edw. Ch. 282; *Orphan Asylum v. McCarter* (1825), 1 Hopk. 429.

⁶¹ *O'Mahoney v. Belmont* (1875), 62 N. Y. 133, at 142.

the case. If the plaintiff should eventually fail in establishing his right against the defendant, the court may by its interim interference have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation.⁶²

§ 660. What Order Appointing Receiver Should Contain.

First. Recitation of pleadings, testimony, affidavits, etc., upon which the order is made.

Second. Name and full description of party appointed.

Third. Full description of all the property covered by the order.⁶³

Fourth. Command to the receiver to take possession.

Fifth. Command to the receiver to manage, control, operate, etc., as the case may be.

Sixth. What payments to be made by receiver, if any.

Seventh. What suits receivers may bring, if any.

Eighth. Receiver to give bond with amount.

Ninth. Receiver's orders as to leases and contracts, with the provision that pending further orders of the court, no act or acts of the receiver or omissions in the performance or failure to perform any acts shall constitute or be construed to constitute an election to adopt or an estoppel to renounce any of them.

Tenth. Receiver to file an inventory and when.

Eleventh. Order upon defendant and officers, directors, agents and employees of company (if a company) and all other persons upon demand of the receiver or his duly authorized agent to turn over and deliver to said receiver or his duly authorized agent any books of accounts, vouchers, papers, deeds, leases, contracts, bills, notes, accounts, moneys or other property.

Twelfth. Injunction directed against the defendant (if a company) its officers, directors, agents and employees and all

⁶² Owen v. Homan (1853), 4 H. of L. Cas. 997, at 1032.

⁶³ Lord Langdale M. R. (1850), 13 Beav. 271, at 273.

other persons claiming to act by, through or under said company, and all other persons whomsoever from interfering in any way whatever with the possession or management of any part of the property or with the property or interfering in any way to prevent the discharge of the duties of the receiver.

Thirteenth. A recitation that the receiver appeared, gave bond in ——— amount which was duly approved, that he took oath of office.⁶⁴

§ 661. Selection of Receiver a Judicial Act. The appointment of a receiver and the fixing of his compensation are judicial acts that can not be abdicated by the court to one or both parties to the suit. But while it must be conceded that the ultimate appointment rests solely with the court to be determined by the exercise of his discretion⁶⁵ there is no principle recognized by the authorities, or supported by sound reason that forbids the judge the freest access to the councils and opinions of those interested in the trust, with respect to the most proper selection. The usual course of practice in the English court of chancery in such matters was to refer the selection to a master. Then interested parties were at liberty to appear before the master and nominate suitable persons from among whom the master would choose the one whose qualifications and fitness his judgment most approved, and report his selection to the court.⁶⁶ According to the practice in the United States courts and most state courts, the judge or chancellor himself appoints the receiver without referring the matter to a master. The court may properly call upon counsel for suggestions and advice as to who shall be appointed.

⁶⁴ In the United States courts, the oath of the receiver is generally administered by the clerk of court and evidenced by a formal certificate filed in the case.

⁶⁵ *Jenkins v. Purcell* (1907), 29 App. D. C. 209, at 213; *Shannon v. Hanks*, 88 Va. 338, 13 S. E. 437.

⁶⁶ *Polk v. Johnston* (1903), 160 Ind. 292, 66 N. E. 752.

§ 662. Who Eligible as Receiver. No one should be appointed a receiver whose duties as receiver would conflict with his own interests.⁶⁷ Said Lord Eldon: "The established practice presumes that a person shall be appointed to the duties of receivers, guardians, or committees consistently with whose professional life so much time can be spared for the management of the estate as can be easily applied and if a probable ground is laid that the requisite attention can not be given, though I do not represent it as an absolute disqualification, such circumstances are to be regarded by the master in the appointment."⁶⁸ Residence at or near the property is not absolutely necessary.⁶⁹ A public accountant living in Birmingham was appointed receiver and manager over a land company operating in London.⁷⁰ Said Warrington, J., "The management of such an estate as this does not require constant attention and I do not see why a manager should not do the work as well from Birmingham as anyone residing in London."

Said the Supreme Court of Pennsylvania in a recent case: "It goes without saying that a receiver who is the officer of the court and whose actions are under its control, ought to be disinterested, unbiased and impartial as between the parties; and when any breach of propriety in any such respect occurs, it is the duty of the court to remove the receiver and substitute another. But in the exercise of this power the court must be guided by sound discretion under the circumstances of the particular case. No definite rule can be framed, but the power of removal is to be exercised under the broad discretionary jurisdiction of a court of equity."⁷¹

⁶⁷ *Northern Brewery v. Princess Hotel* (1915), 78 Or. 453, 153 Pac. 37, at 39; *Fripp v. The Chard Ry. Co.* (1853), 11 Hare 241; *State v. Norfolk, etc., Ry. Co.*, 152 N. C. 785, 67 S. E. 42; *Bartelt v. Smith* (1911), 145 Wis. 31, 129 N. W. 782.

⁶⁸ *Wynne v. Lord Newborough* (1808), 15 Ves. 284, at 285.

⁶⁹ *Tharp v. Tharp* (1806), 12 Ves. 316.

⁷⁰ *In re Carshalton, etc.* (1908), 2 Ch. 68.

⁷¹ *Hilliard v. Railway S. Co.* (1908), 221 Pa. 503, at 506, 70 Atl. 819. See *Northern Brewery Co. v. Princell Hotel* (1915), 78 Or. 453, 153 Pac. 37, at 39; *State v. Norfolk, etc., Ry.*, 152 N. C. 785, 67 S. E. 42; *Bartelt v. Smith*, 145 Wis. 31, 129 N. W. 782.

Some state statutes provide that "no person but a resident of this state shall be appointed or act as receiver of a railroad or other corporation."⁷²

The next friend of an infant was not allowed to be appointed receiver.⁷³

There are many cases in which a person employed to manage a business by the court has a similar business of his own. That of itself is not a disqualification.⁷⁴

An agent of a corporation seeking the appointment of a receiver who is actively engaged in pressing its claims against the debtor should not be appointed receiver of his property.⁷⁵

§ 663. Selection of Honest and Capable Receiver. Consideration of the nature of receivership shows that a receiver should be honest and capable, and when a complicated, intricate and extensive business is committed to his care, he should, when possible, be familiar with such matters.⁷⁶ Says La Combe, J.:⁷⁷ "The course best fitted to secure a careful and intelligent administration of the extensive and complicated business of winding up the affairs of the corporation would indicate the selection of receivers, one of whom was wholly unconnected with the prior administration, and the other thoroughly familiar with the same. As to winding up a corporation, one state statute, for instance, especially provides that a trustee or director may be receiver.⁷⁸ The element of experience in a receivership is sometimes obtained by the receiver employing a person to manage the business under the receiver, which manager was an employee of the company or business before the receivership. There seems no objection to this course, provided such employment is shown to be without any fraud

⁷² Ohio Gen. Code (1910), sec. 11895.

⁷³ *Stone v. Wishart* (1817), 2 Madd. 64; quoted in *Mert v. Kent*, J. (1880), 43 Mich. 297.

⁷⁴ *In re Irish* (1888), 40 Ch. D. 51.

⁷⁵ *Virginia-Carolina Chemical Co. v. Hunter* (1908), 84 S. C. 214, 66 S. E. 177.

⁷⁶ *Fowler v. Jarvis-Conklin Mortg. Co.* (1894), 63 Fed. 888.

⁷⁷ *Fowler v. Jarvis-Conklin Mortg. Co.* (1894), 66 Fed. 14.

⁷⁸ General Code of Ohio (1910), sec. 11944; Revised Statutes, sec. 5657.

or collusion or mismanagement of the trust, and it being further shown that such an employee's duties toward the trust do not substantially conflict with his personal interests.

§ 664. Selection of Impartial and Disinterested Receiver.

It is a rule of general application that a receiver should be a person wholly impartial and indifferent toward all parties interested in the fund over which the court has found it necessary to extend its care and protection.⁷⁹ Where there are conflicting interests between a man in his individual capacity and in his capacity as receiver, he should not be appointed.⁸⁰

Ownership of property involved in the litigation may not of itself render the owner ineligible to appointment as receiver of the interest of another in the profits to be derived from the sale of such property, especially when the interest of the owner is not in conflict with the interests of creditors of such other person.⁸¹ A sheriff is not generally a party interested and is not ineligible under a statute prohibiting "any person interested in any way in an action for the appointment of a receiver."⁸²

A trustee will not ordinarily be appointed receiver of the trust estate, yet if it appears that such appointment would be for the best interests of the estate, the rule may be departed from.⁸³

§ 665. Attorney for Plaintiff Sometimes Not Eligible for Receiver. The duty of the solicitors (or attorneys) of the plaintiff is to check the receiver's accounts. It is so much their

⁷⁹ *Watson v. Cudney* (1908), 144 Ill. App. 624; *Coy v. Title Guarantee & Trust Co.* (1907), 157 Fed. 794; *Virginia-Carolina Chemical Co. v. Hunter* (1909), 84 S. C. 214, at 224, 66 S. E. 177; *Bartelt v. Smith* (1911), 145 Wis. 31, at 36, 129 N. W. 782; *Graham v. Hundley Dry Goods Co.* (1915), Mo. Sup. Ct., 177 S. W. 600; *Lehman v. Trust Co. of America* (1909), 57 Fla. 473, 49 So. 502.

⁸⁰ *Olmstead v. Distilling & Cattle Feed Co.* (1895), 67 Fed. 24; *In re Lloyd* (1879), 12 Ch. D. 447.

⁸¹ *Jenkins v. Purcell* (1907), 29 App. D. C. 209.

⁸² *Crawford v. Crawford* (1913), Tex. Civ. App. 163 S. W. 115; Texas Statutes, art. 2129; Revised Statutes of 1911.

⁸³ *Patterson v. Northern Trust Co.* (1907), 230 Ill. 334, at 337, 82 N. E. 837.

duty that as a general rule no one else does so. The solicitor of the plaintiff attends on the taking of the receiver's account. Jewel, M. R., says:⁸⁴ "Now how is it possible that the firm (of lawyers) can properly discharge that duty when one of the firm is himself the receiver? It is obviously a case where his interest will conflict with his duty, and that consideration alone makes the appointment improper." Cooley, J., in ⁸⁵ quotes *Ryckman v. Parkins*, 5 Paige 543; *Adams v. Woods*, 8 Cal. 206, and says: "The practice in equity does not even permit the receiver to employ a solicitor in the case as his own counsel, lest it might disarm his vigilance in watching the receiver's proceedings." However, Cooley, J., says:⁸⁶ "This rule may, no doubt, be departed from by consent of all parties concerned." But this must mean by consent of all parties concerned in the results of the receivership, provided they make proper objection, and one not a party to the suit may be as much concerned in these as the persons who are parties. There may be cases where a solicitor of a party to the suit in which the receiver is appointed can most properly be solicitor for the receiver because of his particular knowledge of the business. If his interests conflict with the receiver's interest as guardian of the trust, then, of course, such solicitor should not be allowed to act for the receiver.

In *Shannon v. Hanks*, 88 Va. 338, plaintiff's attorney was appointed as receiver and objection was made in the appellate court. The court said: "The general rule undoubtedly is, that a receiver ought to be an indifferent person between the parties. But the selection of a proper person is very much a matter within the discretion of the court, and hence will very rarely be interfered with by an appellate court."⁸⁷

⁸⁴ In re Lloyd (1879), 12 Ch. D. 447.

⁸⁵ Merchants & Manufacturers Nat. Bk. v. Kent, Judge (1880), 43 Mich. 292.

⁸⁶ Merchants & Manufacturers

Nat. Bk. v. Kent, Judge (1880), 43 Mich. 292.

⁸⁷ Jenkins v. Purcell (1907), 29 App. D.-C. 209, at 213, 42 N. E. 638, 42 N. E. 679; Robinson v. Dickey, 143 Ind. 214; Taylor v. Life Assn., 3 Fed. 467.

§ 666. Acceptance of Appointment by Receiver. The receiver must manifest his acceptance of the appointment by some word or overt act. A court can not impose the duty upon him without his consent.⁸⁸ If the person appointed does not qualify another is appointed; if he dies, his successor stands in his shoes. His appointment is only a convenient instrument in effecting the relief intended.⁸⁹ The most effective way of accepting the receivership is by taking the oath prescribed by many statutes.

§ 667. Oath of Receiver. The statutes of most states prescribe that an oath should be made by the receiver, but there is generally no proviso for recording this oath or even for a record that such oath was taken. In the United States courts the practice is for the receiver to make oath before a notary or before the clerk of the court, subscribe this oath and the subscribed oath be filed among the papers. This would be a safe practice to follow in other courts.

Another practice which is highly satisfactory is to recite in the order of appointment that Smith came, and after giving bond in the sum of \$———, which was and is hereby duly approved, that he was duly sworn in as receiver.

However, it will be presumed from the appointment of receivers and their qualification by giving a bond, that they took the requisite oath.⁹⁰

The provision of the statutes of New York requiring a receiver to take a prescribed oath and file it is held in New York state to be directory, and the omission to take and file it until after the receiver, as such, has brought a suit, is not sufficient cause for dismissing the suit.⁹¹

⁸⁸ *Waters v. Carroll* (1836), 17 Tenn. 102.

⁸⁹ *Temple v. Glasgow* (1897), 80 Fed. 441, at 447, 42 U. S. App. 417, at 430.

⁹⁰ *Seymour v. Aultman Co.* (1899), 109 Iowa 297, 80 N. W. 401.

⁹¹ *Dayton v. Borst* (1860), 20 N. Y. Sup. Ct. R. 115; affirmed, 31 N. Y. 435.

§ 668. **Bond of Receiver.** Many state statutes require a bond of a receiver,⁹² and most courts will require it even if the statute is silent. The receiver is given possession of personalty and sometimes of real property, and may himself dissipate or lost such property belonging to others, and should, therefore, give protection by entering into a bond with proper sureties. There is more danger of loss to personal property passing by delivery than to real estate.

Although before the filing of the bond the property is in the custody of the law, nevertheless the receiver is generally not authorized to take possession until after filing his bond.⁹³ The custody of the court is not the custody of the receiver, although the custody of the receiver is by reason of the custody of the court.

In a well-known English case,⁹⁴ wherein a receiver was appointed of certain chattels "upon his giving security," James, L. J., said: "I think it would be dangerous to hold that a mere consent order for the appointment of a receiver should shut out execution creditors. A receiver becomes such on giving security. When he has done that, he can take possession. It would be very serious to hold that he can take possession before giving security. There is no reason to depart from the plain meaning of the words of the order which appoints him receiver conditionally on his giving security." Possession was in that case not taken by the receiver, or at most mere formal possession and nothing to show the world at large that there was any change of possession. Therefore, the court held that an execution creditor who took the chattels in execution after the order appointing a receiver, but before the security had been given, took precedence over the equitable mortgagee who claimed under the receiver.

⁹² General Code of Ohio (1910), sec. 11896; Revised Statutes, sec. 5587; Illinois Statutes, Session Laws of 1903, Receivers, secs. 1 and 2; *Watson v. Cadney* (1908), 144 Ill. App. 624.

⁹³ *Matter of C. J. Co.* (1891), 128 N. Y. 550, 20 N. E. 665.

⁹⁴ *Edwards v. Edwards* (1876), 2 Ch. D. 296.

In the case of real estate it has been said: "A receiver of lands never actually takes possession,"⁹⁵ nevertheless there are cases when he does take possession. In an action by debenture holders to realize their securities,⁹⁶ a receiver was appointed, with orders to take possession (inter alia) of the freehold land and iron works of the company. There was no direction as to his giving security. The receiver entered into possession and remained and was in possession when a judgment creditor of the company levied execution on the goods and chattels of the company then in the possession of the receiver. Chitty, J., held that the receiver was validly in possession, and that, therefore, the judgment creditors were not entitled to the goods. The judge said further, the usual practice was that, if no security was to be given, it should be especially mentioned in the order, and if no security was to be required until a particular time, he always required that the person obtaining the appointment should be responsible for the receiver's receipts in the meantime.⁹⁷

In Alabama and Illinois the statutes require the chancellor, judge or register, before making the appointment, to require the complainant to enter into a bond, and an appointment made without such bond being required by the court and given was held to be error by the court, and the upper court set aside and annulled the appointment.⁹⁸

In some states the bond is given by the receiver and goes "to such person and in such sum as the court or judge directs." Since the property of the judgment debtor is held from the time the order of appointment is made, the failure of the receiver to give bond can not affect the binding of the property or affect

⁹⁵ *Ex parte Evans*, 13 Ch. D. 255; *In re Marriage Neave & Co.* (1896), 2 Ch. 633. See matter discussed.

⁹⁶ *Morrison v. The Kerne Iron Wks. Co.* (1889), 60 L. T. R. (N. S.) 588.

⁹⁷ *Morrison v. The Kerne Iron Wks. Co.* (1889), 60 L. T. R. (N. S.) 588.

⁹⁸ *Capital City Water Co. v. Weatherby*, 108 Ala. 412, 18 So. 841; *Dreyspring v. Loeb* (1896), 113 Ala. 263, 21 So. 73; *David v. Levy* (1898), 119 Ala. 241, 24 So. 589. Same ruling under Illinois Statutes, Sessions Laws of 1903, *Receivers*, secs. 1 and 2; decided, *Ayres v. The Graham St. Cl. Co.* (1909), 150 Ill. App. 137.

the custody of the court. Since, however, the receiver is required by statute to give bond before he enters upon his duties, any disposition of the estate by the receiver before he gives bond would not be according to law, and for good cause shown might be set aside. The purchaser of the property paying money to such receiver was held, in a Virginia case, to have paid the money to a person not authorized to receive it; the said purchaser was in default, must pay again, and the court decreed a resale of the land if the said payment should not be made within a stated time.⁹⁹

In Massachusetts,¹ in a case where the decree did not require the receiver to give bond nor was there the condition that he should first give bond, the court held his not giving bond was no bar to a suit by the receiver, and said that "any person interested can apply to have a bond given if thought necessary."

In Washington, failure to give bond in ex parte appointment is appealable.²

A bond may recite that the obligors are held and firmly bound to the parties to the suit, their successors and assigns and all persons interested or having any interest in the property.³ Such a bond can be sued on by one who loans money to the receiver with the approval of the court, and in that way added to the fund.⁴ A bond may be made payable to the state and to the defendants.⁵

§ 669. Filing of Bond by Receiver. The bond should be drawn up in the usual form of fiduciary bond. The statutes of some states provide that the bond shall be made payable to and in an amount which the court or judge thereof

⁹⁹ Wood v. Ellis (1888), 85 Va. 471, 7 S. E. 852.

¹ Wilson v. Welch (1892), 157 Mass. 77, 31 N. E. 712.

² Libbert v. Unfried (1907), 47 Wash. 182, 91 Pac. 774.

³ Northrup Nat. Bk. v. Varner (1910), 82 Kan. 691, 109 Pac. 394.

⁴ Northrup Nat. Bk. v. Varner (1910), 82 Kan. 691, 109 Pac. 394.

⁵ Williams v. Hitchcock (1915), 86 Wash. 536, 150 Pac. 1143.

shall determine, nevertheless, unless some strong reason demands otherwise, the bond should be payable to the state.⁶

By statute a receiver's bond may be signed by a guarantee company as sole surety, when such company is properly authorized to act in such state.⁷ And a judge, court or officer whose duty it is to pass upon the accounts of a receiver required by law to give bond as such, may allow a reasonable sum paid such guarantee company.⁸

§ 670. Approval of Receiver's Bond. The bond should be formally approved by the judge or court. This can best be done by a formal entry reciting the giving of the bond and the approval thereof, or a recital of the approval of the bond may be made in the entry appointing the receiver.

§ 671. Order of Court to Receiver to Give Notice to Interested Parties. The doctrine of *lis pendens* presumes that everyone in the whole realm, meaning the jurisdiction of the court,⁹ has notice of all legal proceedings within jurisdiction of that court.¹⁰ In spite of the presumption, it is a well-known fact that very few people have actual notice of all the legal proceedings within the jurisdiction of any court.

The statute of Ohio covering the duties of receivers or trustees of dissolved corporations provides, "Immediately on his appointment the receiver shall give notice thereof, which shall contain the same matters required by law in notices of trustees of insolvent debtors. In addition thereto it shall notify all persons holding any open or subsisting contract of the corporation to present it to him in writing and in detail at the time and place in such notice specified, which shall be published for three weeks in a newspaper printed and of

⁶ See *People v. Wiffler* (1911), 167 Mich. 13, 132 N. W. 444. Release of Bond of Receivers; *United States, etc., v. Felder* (1913), 105 Miss. 783, 62 So. 236.

⁷ General Code of Ohio, sec. 9571.

⁸ General Code of Ohio, sec. 9572.

⁹ *Enfield v. Jordan* (1886), 119 U. S. 680, at 693, 30 L. ed. 523, 7 S. C. Rep. 358.

¹⁰ *Atlas Ry. Supply v. Lake Ry.* (1905), 134 Fed. 503.

general circulation in the county wherein the principal place of business of the corporation is situated.”¹¹

When a business, either a corporation or otherwise, is placed in the hands of a pendente lite receiver, the same necessity generally arises, making it imperative that the creditors know of the appointment and that the receiver may know of all claims and of all contracts outstanding.

§ 672. Order of Court to Receiver to File Copy of Appointment Throughout State and in Different States of Same United States Circuit. The Judicial Code of the United States provides among other things, “Where in any suit in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit lies within different states in the same judicial circuit, the receiver so appointed shall upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within the circuit, subject, however, to the disapproval of such order within thirty days thereafter by the circuit court of appeals for such circuit or by a circuit judge thereof after reasonable notice to adverse parties and an opportunity to be heard upon the motion for such disapproval;” and subject, also, to the filing and entering in the district court for each district of the circuit in which any portion of the property may lie or be within ten days thereafter, of a duly certified copy of the bill and of the order of appointment.^{11a} * * *

There is a similar provision in the New York statutes, but no provision in most states for filing such certified copies in the various counties where land or other property of a fixed character is located. In the absence of such a statute, in order to protect possible purchasers without notice of such property and in order to properly protect the

¹¹ General Code of Ohio, sec. 11947; Revised Statutes, sec. 5660. sec. 56. U. S. Compiled Statutes (1916), Vol. I, p. 1164, sec. 1038.

^{11a} United States Judicial Code, March 3, 1911 · 231, 36 Stat. 1087, Hopkins Judicial Code, sec. 56, p. 80.

trust, an application to the court should be made for an order compelling the debtor to give a deed to the receiver of all property in the state and outside of the county when appointment is made. Where there is no provision for filing such certified copy as above mentioned, if filed, it would probably not be held to be constructive notice, but there is generally by statute a provision for filing deeds, and such a deed or deeds should be ordered made by the defendant and properly filed by the receiver.¹²

§ 673. Order of Court Setting Time for Filing Claims. Requests of the receiver to the court for instructions or for orders are generally in the shape of petitions or applications. One of the first which arises is a petition to the court for an order setting a time before which all creditors shall file verified claims with the receiver or be barred from participating in the distribution of funds by the receiver.¹³ The order should generally contain a provision for a copy of the same or the substance of the same, to be published for four consecutive weeks in some newspaper of the county and also copies to be sent to every known creditor.¹⁴

Such a procedure is statutory as far as concerns a receiver for winding up corporations in some states, but generally such statutes do not obtain on the subject covering receiver pendente lite.

§ 674. Vacation of Appointment of Receiver. The power of courts to vacate orders appointing receivers on motion of the party aggrieved or even on their own motion is well established.¹⁵ It is, however, necessary for the court to proceed contradictorily, that is, the opposing parties or adversaries should have a proper hearing. Where a court is convinced

¹² For a full discussion see ch. III, *infra*, "Jurisdiction in the Appointment of Receivers."

¹³ *Smith v. Jones Lumber & Mercantile Co.* (1912), 200 Fed. 647, at 651; *Pennsylvania Steel Co. v.*

New York City Ry. Co. (1911), 187 Fed. 287.

¹⁴ See General Code of Ohio, sec. 11947.

¹⁵ *Nelson v. Adolph Roquet* (1909), 123 La. 91, at 96, 48 So. 756.

that it has exceeded its jurisdiction in the appointment of a receiver, it is proper to annul the apparent authority of the receiver and deprive him of the semblance of capacity as the court's representative.¹⁶

An affidavit by an attorney for a judgment creditor that a partnership is solvent; that the receivership was obtained for the purpose of hindering and delaying creditors and for the benefit of the partners, has been held not sufficient to authorize a court to vacate the appointment of receivers for a partnership.¹⁷

§ 675. Modification of Order Appointing Receiver. A court during the term has full power to correct its records so as to make the same speak the truth. Therefore, an order appointing a receiver may be amended so as to correctly recite the order as it was intended to be and as it actually was directed.¹⁸ An order appointing a receiver is interlocutory, with few exceptions.

§ 676. Right of Receiver to Appeal. In respect to many matters the receiver has no right to appeal, while in respect to others his right may not be gainsaid. He may appeal from an order or decree which affects his personal rights, provided it is not an order resting in the discretion of the court. Thus he may rightfully appeal from a decree refusing him compensation or disallowing his accounts.¹⁹ He may appeal from an order disallowing him commissions or fees, because that affects him personally, is not a matter purely of discretion and does not delay or interfere with the orderly administration of the estate.²⁰ He may appeal from a decree establishing a claim against the estate,²¹ or denying a claim asserted

¹⁶ Bibby v. Dieter (1910), 15 Cal. App. 45, 113 Pac. 874.

¹⁷ Patterson v. Patterson (1910), 184 Fed. 547.

¹⁸ Schmidt v. Johnson (1912), 161 Ill. App. 623, at 626.

¹⁹ Bosworth v. Terminal R. R. Assn. (1897), 80 Fed. 971.

²⁰ Bosworth v. Terminal R. R.

Assn. (1898), 174 U. S. 182, at 189, 43 L. ed. 941, 19 S. C. Rep. 625.

²¹ Pickering v. Richardson (1910), 57 Wash. 117, 106 Pac. 614. See Bosworth v. Terminal R. Assn. (1897), 80 Fed. 969; Felton v. Ackerman, 61 Fed. 225; Hallam v. Tillinghurst, 19 Wash. 20, 52 Pac. 329.

against the estate. He has no right to appeal from a decree removing him from his position, for that is a matter of discretion with the court appointing him, and he holds his position by the sufferance of the court, nor has he the right of appeal from a decree authorizing an issue of receiver's certificates or directing a particular management of the trust property, or directing sale of the mortgaged property, or confirming its sale, or directing the turning over of the property in his hands,²² for he is neither the censor of the court nor interested in the event.²³ Said Jenkins, C. J.: "The true line of demarcation we think to be this: He has the right of appeal with respect to any claim asserted by or against the estate, for therein he is the representative of the entire estate. He has the right of appeal from any decree which affects his personal right, for therein he has an interest. But he has not the right of appeal from a decree declaring the respective equities of the parties to the suit. He should therein be indifferent and not a partisan. His duty is to all parties in common. He should not become the advocate of one against another."²⁴

An order authorizing a receiver to pay to himself from funds in his hands as custodian for the court a specific sum for past services rendered as such receiver is a complete withdrawal of so much of such funds from the court's possession and as such is a final order and appealable,²⁵ either by a party to the suit affected or by the receiver himself. It has been held that the allowance of an appeal taken by a receiver is equivalent to leave by the court to the receiver to take an appeal.²⁶

²² *Bank v. Bank* (1900), 127 N. C. 432, 37 S. E. 461.

²³ *Bosworth v. Terminal R. Assn.* (1897), 191 Ala. 137, 80 Fed. 969; *Coffee v. Gay* (1914), 67 So. 681; *Bosworth v. Terminal R. Assn.* (1899), 174 U. S. 182, 43 L. ed. 941, 19 S. C. Rep. 625; *McKinnon v.*

Wolfender, 78 Wis. 237, 47 N. W. 436.

²⁴ *Bosworth v. Terminal R. Assn.* (1897), 80 Fed. 969.

²⁵ *Ruggles v. Patton* (1906), 143 Fed. 312.

²⁶ *Farlow v. Kelley* (1881), Supreme Court of U. S., 108 U. S. 288.

A receiver may appeal from a decree of the court below which affirms a report of an auditor who surcharged the receiver in various amounts and refused to allow the receiver compensation for his services, reduced the amount claimed as compensation for the receiver's counsel and charged the receiver with a certain portion of the expenses of the audit.²⁷

Where the receiver gets authority from the appointing court to bring a suit in such court, such authority will not authorize the receiver to bring an appeal from an adverse judgment in that suit. When the suit of the receiver relates to the estate, it is for the court to say whether or not an appeal will be taken.²⁸

Said the Supreme Court of Ohio, 1886: "A judgment rendered where no cause has been stated is as much a judgment upon a case *coram non iudice*, whatever may be the jurisdiction of the court rendering it, as a judgment upon a case, however perfectly stated, before a court not clothed with jurisdiction to hear and determine it."²⁹

(a) Order Disbursing Assets Appealable by Receiver. A receiver has a right to appeal from an order disbursing funds which order is adverse to the parties to the suit because the receiver represents the entire estate and he indirectly represents the interests of all persons interested in the estate.³⁰ "A receiver may defend both in the court appointing him and by appeal, the estate in his possession against all claims which are antagonistic to the rights of both parties to the suit."³¹

"He may likewise defend the estate against all claims which are antagonistic to the rights of either party to the suit, subject to the limitation that he may not in such defense question any order or decree of the court distributing bur-

²⁷ Covington, appellant, v. Hawes-La Anna Co. (1914), 91 Atl. 514, 245 Pa. St. 73.

²⁸ Coffee v. Gay (1914), 191 Ala. 137, 67 So. 681; Cobbs v. Vizard Inv. Co. (1913), 182 Ala. 372, 62 So. 730.

²⁹ Spoons v. Coen (1886), 44 O. S. 497, at 503, 9 N. E. 132.

³⁰ Kavanagh v. Bank of America (1909), 239 Ill. 404, at 406, 88 N. E. 171; Felton v. Ackerman (1894), 61 Fed. 225.

³¹ Bosworth v. Terminal Ry. Assn. (1898), 174 U. S. 182, 43 L. ed. 941, 19 S. C. Rep. 625.

dens or apportioning rights between the parties to the suit, or any order or decree resting upon the discretion of the court appointing him.”³²

(b) Right of One Joint Receiver to Appeal. Where there are two or more receivers appointed, it has been held that one of such receivers has a right to appeal from an order which he believes is inimical to the best interests of the trust imposed upon him, even though the majority of the receivers feel that an appeal should not be taken. He has a right to defend the trust estate committed to his charge. “If he has the right to defend and urge upon the court the justice of his defense, he has also the right to call in question the judgment of the court if he believes it is wrong; in other words, the right to except and appeal.”³³

§ 677. Order Disbursing Assets Appealable by Parties to Suit. As the receiver in certain cases³⁴ has a right to appeal from an order disbursing assets of the estate so the parties to the suit whose interests the receiver represents if they are parties to the decree and are affected adversely by the decree, have a right to appeal.³⁵

An appeal may be taken from an order for the payment of money by the Indiana statute.³⁶ Most states by statute allow an appeal in such cases.

§ 678. Order Disbursing Assets Appealable by Claimants. Ordinarily an appeal can not be predicated upon an order which is not in the nature of a judgment and does not involve the determination of any question of law or fact in issue, but is made in the exercise of the court’s discretion in respect to

³² *Bosworth v. Terminal Ry. Assn.* (1898), 174 U. S. 182, at 186, 43 L. ed. 941, 19 S. C. Rep. 625.

³³ *Goodman Mfg. Co. v. Pittsburgh-Buffalo Co.* (1915), 222 Fed. 144, at 147.

³⁴ See sec. 676(a).

³⁵ *Kavanagh v. Bank of America* (1909), 238 Ill. 404, at 406, 88 N. E. 171.

³⁶ *Akron Milling Co. v. Leiter* (1914), 107 N. E. 99, 57 Ind. App. 394, citing Indiana Statutes, sec. 1392, cl. 15; *Burns* 1914, Acts 1907, p. 237.

a purely administrative matter.³⁷ And an order which is entered in the exercise of the court's discretionary power can not be set aside unless it appears that it was so unreasonable, under the circumstances before the trial court that its authorization amounted to a clear abuse of judicial discretion.³⁸ However, creditors of a receivership whose claims had been proved and allowed under a decree have a right to be heard in that court upon any actions of the court or the receiver, by which they might claim to be aggrieved. They have further the right, should any decree be passed in the progress of the cause which as to them is a final one and is unfavorable to their interests to bring it before a higher court for review upon appeal.³⁹ Such an appeal may be had under the general rules of chancery practice⁴⁰ and by the statutes of many states.⁴¹

A decree ordering the disbursements of moneys in the hands of a receiver when such an order affects the rights of claimants entitled to distribution of that fund or funds in the hands of receivers and leads to a final decree determining rights, may be properly brought up to an appellate court for review.⁴²

After a court has allowed a party to intervene and affording all parties an opportunity for a more simple and expeditious determination of the controversy than an independent action would give them, any party aggrieved by the court may appeal.⁴³

§ 679. Order Requiring Third Party to Pay Money to Receiver Is Appealable. A court appointing a receiver properly orders its receiver to take possession of property belonging

³⁷ *Macdonald v. Aetna Indemnity Co.* (1915), 88 Conn. 571, at 577 92 Atl. 154.

³⁸ *Wood v. Holab*, 80 Conn. 314, at 315, 68 Atl. 323; *Cables v. Bristol Water Co.*, 86 Conn. 223, at 205, 84 Atl. 928. See *Trustees v. Greenough* (1881), 105 U. S. 527, at 531, 26 L. ed. 1157.

³⁹ *Macdonald v. Aetna Indemnity Co.* (1914), 88 Conn. 511, at 577, 92 Atl. 154; *Links v. Connecticut R. B. Co.* (1895), 66 Conn. 277, at 283, 33 Atl. 1003.

⁴⁰ *Guarantee, etc., v. Philadelphia Ry.* (1897), 69 Conn. 709, at 715, 38 Atl. 792.

⁴¹ *Guarantee, etc., v. Philadelphia Ry.* (1897), 69 Conn. 709, at 715, 38 Atl. 792, citing Connecticut Statutes, secs. 1322, 1942.

⁴² *Eiswald v. Nautical Preparatory School* (1910), 75 Atl. 262, — R. I. —.

⁴³ *DeForrest v. Coffee* (1908), 98 Pac. 27, at 31, 154 Cal. 444, and cases cited.

to the defendant over whose property the receiver is appointed. It frequently happens that an original defendant in the main suit or a party subsequently made a defendant refuses to pay over to the receiver money or funds claimed to belong to the original defendant. The question of ownership is frequently sent to a master for his recommendation. The court either upon the recommendation of the master or without such a recommendation may make a rule against such a party to the suit to show cause why he should not turn over to the receiver such money or funds.

An appeal from such an order of court will lie to a higher court because such an order is final in so far as the party holding the funds or property is concerned. And being either a final order or in the nature of a final order is appealable under Illinois practice.⁴⁴

Appeal and error proceedings are fixed by the constitutions and laws of the United States and the separate states and decisions of the courts interpreting them. It is therefore necessary to examine such as are applicable to that particular jurisdiction in which we are interested.

§ 680. Order Removing Receiver Not Appealable. An order removing a receiver has reference to the person of the receiver. The removal of one particular person as receiver does not necessarily mean the taking of the property out of the custody of the court. A receiver has no property right in the office of the receiver. He holds such office by suffrance of the court appointing him. He, therefore, has no substantial right violated by being removed from office and, therefore, has no right to appeal from such an order.⁴⁵ Although the parties to the suit may have substantial rights violated by the court taking custody of the property or failing to take custody

⁴⁴ *Burnham v. Barrett* (1907), 137 Ill. App. 119, at 124. See *People v. Prendergast*, 117 Ill. 588, at 594, 6 N. E. 695; *Blake v. Blake*, 80 Ill. 523, at 524; *Nevitt v. Woodburn*, 45 Ill. App. 417, at 418; *McCormick v. Park Com'rs*, 118 Ill.

655, at 662, 8 N. E. 818; *Rhodes v. Rhodes*, 172 Ill. 187, at 189; 15 N. E. 170; *Chicago & N. W. Ry. Co. v. City*, 148 Ill. 141, at 153, 35 N. E. 881.

⁴⁵ *Bosworth v. Terminal R. R. Assn.* (1897), 80 Fed. 969.

of the property, nevertheless no substantial right of the parties is violated by the court failing to appoint or removing a particular person to the office of receiver. That matter is purely discretionary with the appointing court.⁴⁶ Some states have statutes allowing an appeal from an order appointing or removing or refusing to appoint or remove.⁴⁷ We are led to believe the word remove may frequently be used meaning discharge. Sometimes they are used apparently interchangeably.⁴⁸

The Supreme Court of Pennsylvania has recently said⁴⁹ in discussing the propriety of appointing a receiver disinterested and of the propriety of a certain appointment: "We have no doubt whatever but that if a proper case for its exercise be made out, it is the right and duty of an appellate court to review the judgment of the court below to the removal or discharge of a receiver. But we are equally clear that this duty is one to be exercised only in cases showing a manifest abuse of discretion."

When an order removing a receiver on the ground of incompetency or lack of integrity, he should be allowed to appear and be heard in his own defense. An appeal has been allowed in New York state from an order which removed a receiver and failed to protect him against actual and necessary disbursements which he had incurred in bringing suits as receiver.⁵⁰ Such an order appealed from affects the receiver's right to property, and the appeal should be based on that right rather than on any right of the receiver to hold the office of receiver.

§ 681. Order Refusing to Remove Receiver Not Appealable.

The removal of a receiver is a matter purely discretionary

⁴⁶ *Pagett v. Brooks* (1903), 140 Ala. 257, 37 So. 263; *Meyer v. Thomas* (1901), 131 Ala. 111, 30 So. 89.

⁴⁷ *Laws of Washington of 1893*, p. 119; construed in *Armstrong v. Ford* (1894), 10 Wash. 64, at 67, 38 Pac. 866.

⁴⁸ *Pagett v. Brooks* (1903), 140 Ala. 257, 37 So. 263.

⁴⁹ *Hilliard v. Railway S. Co.* (1908), 221 Pa. 503, at 506 and 507, 70 Atl. 819.

⁵⁰ *Flinn v. Hanbury* (1913), 157 N. Y. App. Div. 207, 141 N. Y. S. 844.

with the appointing court. The receiver has no property right in his office, and the litigant although he may have shown circumstances demanding a receiver, and a substantial right of his may be violated by the court either by granting a receivership or refusing to appoint a receiver, nevertheless the personnel of the receivership is a matter for the court to determine and is not reviewable on appeal.⁵¹ An order refusing to remove stands on the same basis as an order to remove and is not appealable.

§ 682. Order Fixing Compensation of Receiver and Ordering It Paid Is Appealable. A receiver has no right to appeal from a decree removing him from his position for that is a matter of discretion with the court appointing him and he holds his position by the suffrance of the court.⁵² A receiver has no right to be receiver, but after he as receiver has earned a compensation, any decree affecting his compensation affects his personal right in such a decree and he has a right to appeal from such a decree.⁵³ Such a decree is not a matter purely of discretion and does not delay or interfere with an orderly administration of the estate.⁵⁴

"The power of a chancellor to fix an allowance out of a fund in court for the services of a special master receiver, counsel, trustees, etc., is not uncontrollable, as it would be if orders making such allowance were not subject to review. In such matters great latitude may be properly accorded to the judge administering a property and acquainted with the services under the court's direction. Nevertheless if wrong principles be applied in settling such compensation, it will be competent for an appellate court to correct the wrong. The most extravagant allowances in such cases, and the grossest

⁵¹ *Jenkins v. Purcell* (1907), 20 App. D. C. 209, at 213; *Shannon v. Hanks*, 88 Va. 338, 13 S. E. 437; *Robinson v. Dickey*, 143 Ind. 214, 42 N. E. 638-670; *Taylor v. Life Ins. Co.*, 3 Fed. 467.

⁵² *Bosworth v. Terminal R. Assn.* (1897), 80 Fed. 971.

⁵³ *Bosworth v. Terminal R. Assn.* (1897), 80 Fed. 972; *Reardon v. Youngquish* (1914), 189 Ill. App. 1.

⁵⁴ *Bosworth v. Terminal R. Assn.* (1898), 174 U. S. 182, at 189, 43 L. ed. 941, 19 S. C. Rep. 625.

misapplication of correct legal principles might go unchallenged unless the matter was subject to review by appeal.”⁵⁵

The question of whether or not by the usages and rules of equity unhampered by any state, constitutional or legislative enactment to the contrary permit an appeal from an order fixing the compensation of a receiver and ordering the amount paid out of a particular fund or charged against a particular party to the case and enforceable against any party by execution⁵⁶ or otherwise depends upon the question, is it a final determination of the particular matter. “The test of the finality of a decree affecting either the conduct or the compensation of a receiver is not found in the mere fact as to whether the receivership was thereafter continued, but in the nature and character of the order itself.”⁵⁷ An order fixing the amount of compensation of a receiver can not by itself injure anyone, but if in addition to the order of fixing the amount, the court should order it paid out of the fund in the receiver’s hands, such order, under whatever name it might be designated, would be a final adjudication upon a collateral matter arising out of the action and would be appealable by any party interested in the fund.⁵⁸

“A decree by a circuit court of the United States directing that the complainant be paid his costs and expenses out of the fund in court, the fund in the meantime remaining in the court in course of administration, is pro tanto a final decree, from which if the amount be sufficient an appeal will lie.”⁵⁹

⁵⁵ *In re Michigan Cent. Ry. Co.* (1903), 124 Fed. 733. See *Trustees of Greenough* (1881), 105 U. S. 527, 26 Law Ed. 1157; *Williams v. Morgan* (1883), 111 U. S. 684, 28 Law Ed. 559; *Mason v. Pewabic M. Co.* (1893), 153 U. S. 361, 38 Law Ed. 745; *Graham v. Hundley Dry Goods* (1915), 177 S. W. (Mc.) 600.

⁵⁶ *Grant v. Superior Court* (1895), 106 Cal. 326, 30 Pac. 604; *P. N. Bank v. Bayne* (1893), 140 N. Y. 321, 35 N. E. 630; *Ruggles v. Patton* (1906), 143 Fed. 312, at 313; *Face v. Hall* (1915), 148 N. W. 777, 183 Mich. 22.

⁵⁷ *Lurton, C. J., Ruggles v. Pat-*

ton (1906), 143 Fed. 312, at 313.

⁵⁸ *Grant v. Superior Court* (1895), 106 Cal. 326, 30 Pac. 604; *Capital City v. Anderson* (1912), 138 Ga. 667, 75 S. E. 1040; *Thompson v. Huron Lumber Co.* (1893), 5 Wash. 531, 32 Pac. 536. See *People v. Brooklyn Bank* (1910), 126 N. Y. S. 155; *Burroughs v. Merrifield* (1910), 243 Ill. 362, 90 N. E. 750.

⁵⁹ *Trustee v. Greenough* (1881), 105 U. S. 527, 26 L. ed. 1157; *Jacksonville v. American Const. Co.* (1893), 57 Fed. 69. See *Eames v. H. B. Clafin Co.* (1916), 231 Fed. 693; allowances of lower court upheld.

A decree of the court below is appealable which affirms the report of an auditor who was appointed to pass upon the accounts of appellant as receiver when such auditor's report surcharged the receiver in certain amounts, refuses to allow him compensation for his services, reduces the amount claimed as compensation for his counsel and charges the receiver with a certain portion of the expenses of the audit.⁶⁰

While this work is going to print, a case is pending in the Supreme Court of Ohio⁶¹ in which the question of determination by the court is whether an appeal will lie to the Court of Appeals of Ohio as now constituted by the Amended Constitution of 1912 from an order of the court of common pleas fixing the compensation of a receiver and directing the payment of same, out of the funds in his hands after judgment rendered on the merits between the parties in an action to administer the assets of the corporation as a trust for the benefit of creditors.

§ 683. Order Appointing Receiver Not Generally Appealable. An order appointing a receiver is interlocutory and not final and generally held to be discretionary. For these reasons such orders are generally, without statute,^{61a} not appealable.⁶² Such interlocutory orders, however, as well as all other proceedings, in a chancery cause, are brought up for revision on a general appeal.⁶³ Yet the United States Supreme and state courts have held decrees appointing receivers appealable in certain cases. Says the Supreme Court of the United States, "While the parties to this suit were fiercely litigating the amount of the mortgage debt, and questions of fraud in the

⁶⁰ Covington, Appellant, v. Hawes-La Anna Co. (1914), 245 Pa. St. 73, at 79, 91 Atl. 514. See Pratumuk's Appeal (1915), 250 Pa. 45, 95 Atl. 326; Commonwealth v. Monongahela Val. Bank (1913), 239 Pa. St. 254, 86 Atl. 719.

⁶¹ Thompson, et al., v. Denton (1917), 95 O. S. 333.

^{61a} See 685, infra.

⁶² Folk v. United States (1916), 233 Fed. 177-182; Am. Grain Separator v. Twin City, etc., 202 Fed. 202, at 206; Craighead v. Wilson

(1855), 18 How. 199, at 201, 15 Law Ed. 332; Milwaukee & M. Ry. v. Soutter (1864), 154 U. S. 540, 17 L. ed. 616, 14 S. C. Rep. 1158; Dawson v. Parsons (1893), 137 N. Y. 605, 33 N. E. 326; Nash v. Meggett (1895), 89 Wis. 486, 61 N. W. 283; Farson v. Gorham (1886), 117 Ill. 137, 7 N. E. 104.

⁶³ Enochs v. Wilson (1883), 11 Lea (Tenn.) 228; Anderson v. Robinson (1912), 63 Or. 228, 127 Pac. 546.

origin of that debt, the appointment, or discharge of a receiver for the mortgaged property very properly belonged to the discretion of the court in which the litigation was pending. But when those questions had been passed upon by the circuit court, and by this court also on appeal, and the amount of the debt definitely fixed by this court, the right of the defendant to pay that sum, and have a restoration of his property by discharge of the receiver is clear and does not depend on the discretion of the court. It is a right which the party can claim,⁶⁴ and if he shows himself entitled to it on the facts in the record, there is no discretion in the court to withhold it."

It has been frequently held in Michigan that an order appointing a receiver is appealable if it divests a party of a possession to which he is of right entitled and the appealability of an order is not determined by the stage of the case at which it is made, but by the effect on the rights of the parties, and that must be the test of the finality of the order.⁶⁵ In a Utah case an order appointing a receiver was held to be a final order.⁶⁶ Cases holding that an order appointing a receiver is appealable when the decision is not based on a state or federal statute allowing such, an appeal will generally be found to be based on the idea that the receivership was for the purpose of realizing the property rather than simply preserving it. When property is taken into the custody of the court simply to preserve it, no substantial right of the owner is in most cases violated. But when a receiver is appointed to realize property and apply it to the payment of an alleged debt, then such taking of the property may, in fact, effect a substantial right of the owner.

"In England it has been thought right in principle that appeals should lie from chancery to a tribunal of ulterior

⁶⁴ *Railroad Co. v. Soutter* (1864), 69 U. S. 510, 17 L. ed. 900.

⁶⁵ *Taylor v. Sweet* (1879), 40 Mich. 736; *Mardin v. Wayne, C. J.* (1898), 118 Mich. 353, 76 N. W. 497. See *Barry v. Briggs* (1871),

22 Mich. 200; *Brown v. Ring* (1889), 77 Mich. 159, 43 N. W. 770, 1152; *Lewis v. Campan* (1866), 14 Mich. 458.

⁶⁶ *Ogden City v. Bear Lake, etc.* (1898), 16 Utah 440, 52 Pac. 697.

jurisdiction the House of Peers without consulting the will of the Chancellor on the subject.”⁶⁷

In Maryland it was decided by the supreme court that the appellate court was the one and not the original court to decide whether an adjudication was appealable or not.

In Delaware the chancellor recently held that he would not deny a right to a corporation to go to the Supreme Court of Delaware to review on appeal an order of the chancellor appointing a receiver pendente lite to take charge of and administer the effects, business and affairs of a corporation.⁶⁸

§ 684. Order Refusing to Appoint Receiver Not Generally Appealable. An order refusing to appoint a receiver is interlocutory and not final, the same as an order appointing a receiver and generally held to be discretionary. Such an order is generally held to be nonappealable for the same reasons that an order appointing a receiver is held to be nonappealable.

§ 685. Order Appointing Receiver Often Appealable by Statute. The federal and many of the state legislatures saw the frequent injustice of not allowing an appeal from an order appointing a receiver. Congress in 1891⁶⁹ passed an act which has been amended in 1911⁷⁰ and allows an appeal from an interlocutory order or decree granting or continuing, refusing or dissolving an injunction, or refusing to dissolve an injunction or appointing a receiver. This appeal is taken to the circuit court of appeals. A number of code states have passed statutes allowing an appeal from interlocutory orders appointing a receiver.⁷¹ These code provisions either expressly or impliedly allow an appeal from such an interlocutory order.

⁶⁷ *Thompson v. McKim* (1825), 6 Har. and J. (Md.) 302, at 330.

⁶⁸ *Ellis v. Pennsylvania Beef Co.* (1911), 80 Atl. 666, at 672, 9 Del. Ch. 213.

⁶⁹ 26 U. S. Stat. at L. of 1891, 928.

⁷⁰ United States Judicial Code of 1911, sec. 129, 36 Stat. 1134; United

States Comp. Stat. of 1916, sec. 1121.

⁷¹ Code of Alabama of 1896, secs. 429 and 800; Code of Iowa, secs. 2631 and 3495; construed in *Callanan v. Shaw* (1865), 19 Iowa 183; *Laws of Washington of 1893*, p. 119; construed in *Armstrong v. Ford* (1894), 10 Wash. 64, at 67, 38 Pac. 866.

Under the Virginia statutes ⁷² it has been held that an order appointing a receiver which changes the possession as well as the control of the property is embraced within the provisions of sec. 3454 of the code on the subject of appeals and an appeal may be taken in such a case.⁷³

§ 686. Order Refusing To Appoint Receiver Often Appealable by Statute. The refusal of a court to appoint a receiver under a proper case made may frequently be as great as the appointment of a receiver, and the right to have such action or refusal to take action reversed on appeal is the subject of recognition by statutes.⁷⁴

§ 687. Order Vacating Appointment of Receiver Not Generally Appealable. "To vacate the appointment is to set aside the order of the appointment because improperly granted, the motion for which is based on the circumstances and conditions attending the appointment."⁷⁵ The appointment of a receiver is an interlocutory order, and it is discretionary with the court making the appointment. Such an order is frequently held by the courts to be nonappealable.⁷⁶ To vacate the order may affect substantial rights of the parties to the suit as well as the making of an order appointing a receiver and so taking custody of the property by the courts. Statutes which allow an appeal from an order appointing a receiver generally by express words or by implication allow an appeal from an order vacating such an order.⁷⁷

⁷² Virginia Code of 1904, sec. 3454.

⁷³ Shannon v. Hanks (1891), 88 Va. 338, 13 S. E. 437. See Bristow v. Home Bldg. Co. (1895), 91 Va. 18, 20 S. E. 946.

⁷⁴ Code of Iowa, secs. 2631 and 3495 of Revision; construed in Calahan v. Shaw (1865), 19 Iowa 183; Laws of Washington (1893), p. 119; construed in Armstrong v. Ford (1894), 10 Wash. 64, at 67, 38 Pac. 866; Code of South Caro-

lina, sec. 11 (D), 4; construed in Lyles v. Williams (1913), 96 S. C. 290, at 293, 80 S. E. 470.

⁷⁵ Pagett v. Brooks (1903), 140 Ala. 257, at 260, 37 So. 263.

⁷⁶ Connolly v. Kertz (1879), 78 N. Y. 620; Cushman v. Brandredth (1872), 50 N. Y. 296; Turner v. Crichton (1873), 53 N. Y. 641.

⁷⁷ Code of Alabama of 1896, secs. 429, 800; construed in Pagett v. Brooks (1903), 140 Ala. 257, 37 So. 263.

It has been held in Montana that the effect of an order annulling or abrogating an order appointing a receiver is to blot out the receivership as from the beginning and leave the party who procured the appointment liable for the expense incurred by reason of the receivership over what it would have been if a receiver had not been appointed. Such an order annulling the receivership was held not appealable but may be reviewed on appeal from the final judgment.⁷⁸

§ 688. Order Refusing to Vacate Order Appointing Receiver Not Generally Appealable. The appointment of a receiver is an interlocutory order and it is discretionary with the court making it. Therefore such an order is frequently held by the courts to be not appealable.⁷⁹ Likewise the refusal of the court to vacate an order appointing a receiver is, except where there is a statute permitting such an appeal, generally not appealable.⁸⁰ The refusal to vacate an order means the continuation by the court of the receivership and the custody of the property. This may effect a substantial right of one or more of the parties to the suit and on this ground statutes have been passed by the federal⁸¹ and state legislatures⁸² making such an order appealable and in Ohio subject to review by writ of error.⁸³

§ 689. Order Discharging Receiver Not Generally Appealable. Since an order appointing a receiver is interlocutory and not appealable except by statute, so is an order discharging a receiver or vacating an order appointing a receiver, or

⁷⁸ *Taintor v. St. John* (1915), 50 Mont. 358, 146 Pac. 939.

⁷⁹ *Connolly v. Kretz* (1879), 50 N. Y. 620; *Cushman v. Brandreth* (1872), 50 N. Y. 246; *Turner v. Crichton* (1873), 53 N. Y. 641.

⁸⁰ *Miller v. Lehman, Durr & Co.* (1888), 87 Ala. 579, 6 So. 361; *Basche v. Pringle* (1891), 21 Ore. 24, 26 Pac. 863.

⁸¹ United States Judicial Code of

1911, sec. 129; U. S. Comp. Stat. (1916), sec. 1121, 36 Stat. 1134.

⁸² Code of Alabama of 1896, secs. 429 and 800. See *Pagett v. Brooks* (1903), 140 Ala. 257, 37 So. 263; Washington Laws of 1893, p. 119; construed in *Armstrong v. Ford* (1894), 10 Wash. 64, at 67, 38 Pac. 866.

⁸³ Ohio General Code, sec. 12258, construed in *C. S. & C. R. v. Sloan* (1876), 31 O. S. 1.

continuing, refusing, dissolving or refusing to dissolve an injunction or appointing a receiver. A litigant may have a substantial right violated either by the granting or refusing to discharge a receiver and state statutes have been passed providing for an appeal in such cases,⁸⁴ and United States statutes allowing an appeal in such a case from the United States District Court of Appeals.⁸⁵

§ 690. Order Refusing to Discharge Receiver Not Generally Appealable. An order refusing to discharge a receiver may affect a substantial right of the parties to the suit as well as an order discharging a receiver. Nevertheless such an order is frequently held to be not appealable, even in a state which has a statute granting an appeal from an order appointing a receiver. The Superior Court of Maryland saying, "While an appeal is given from an order appointing a receiver, no appeal is given from an order refusing to rescind the appointment or to discharge the receiver."⁸⁶ We submit such an order may affect substantial rights of the parties litigant as well as the order appointing a receiver. The Supreme Court of the United States in a leading case has said concerning the appointment and discharge of a receiver in a railroad foreclosure case: "While the parties to this suit were fiercely litigating the amount of the mortgage debt and question of fraud in the origin of that debt, very properly belonged to the discretion of the court in which the litigation was pending. But when those questions had been passed upon by the circuit court and by this court also on appeal, and the amount of the debt definitely fixed by this court, the right of the defendant to pay that sum, and have a restoration of his property by discharge of the receiver is clear and does not

⁸⁴ State, ex rel., v. Egan (1895), 62 Minn. 281, 64 N. W. 813, construing Gen. Stat. Minnesota of 1894, sec. 6140, sub-sec. 2.

⁸⁵ United States Judicial Code of 1911, 36 Stat. 1134, 129 U. S. Comp. Stat. (1916), sec. 1121.

⁸⁶ Hull v. Caughy (1886), 66 Md. 104, 6 Atl. 591; Williams Co. v. United States Bak. Co. (1897), 86 Md. 475, 38 Atl. 990, discussing Maryland Code, art. 5, sec. 21.

depend on the discretion of the court. It is a right which the party can claim, and if he shows himself entitled to it on the facts in the record, there is no discretion in the court to withhold it.”⁸⁷

Congress has passed an act allowing an appeal from such an order made in a United States district court to the United States Circuit Courts of Appeals.⁸⁸

§ 691. Order Vacating Judicial Sale Not Appealable. Said the Supreme Court of New York: “An application for relief against a judicial sale is addressed to the discretion of the court of original jurisdiction, and no appeal lies to this court from an order made in the exercise of such discretion.” *Hazleton v. Wakeman*, 3 How. Pr. 357; *Wakeman v. Price*, 3 Comst. 334; *Buffalo Savings Bank v. Reynolds*, 33 N. W. 160; *Dows v. Congdon*, 28 N. Y. 122. It follows that the same court has power to set aside judicial sales made pursuant to its judgments, or orders for fraud or irregularity, and that orders vacating such sales for such reasons are not reviewable here. *May v. May*, 11 Paige, 201.”⁸⁹ Such a court has power to do equity in such cases to the purchaser.⁹⁰

§ 692. Effect on Receivership of Appeal of Main Cause. Under the Ohio statute governing an appeal, the appointment of a receiver while the cause is in the common pleas is not vacated, or superseded by an appeal to the district court and the powers and duties of the receiver still continue notwithstanding the appeal.⁹¹

Under the practice an appeal in a chancery case undoubtedly removed the case and gave exclusive jurisdiction to the appellate court. If it was not the intention to remove the cause into the appellate court, it must have been intended

⁸⁷ *Railroad v. Souter* (1864), 69 U. S. 510, 17 L. ed. 900.

⁸⁸ U. S. Judicial Code of 1911, sec. 129; U. S. Comp. Stat. (1916), sec. 1121, 36 Stat. 1134.

⁸⁹ *Hale v. Clausen, et al.* (1875), 60 N. Y. 339, at 341.

⁹⁰ *Hale v. Clausen, et al.* (1875), 60 N. Y. 339, at 341.

⁹¹ *Swing, et al., v. Townsend* (1873), 24 O. S. 1.

to leave in the court below all jurisdiction in the cause not inconsistent with the power to reverse, vacate, or modify the final order or judgment.⁹²

In Ohio the only effect of an appeal is to suspend the judgment appealed from and not to vacate, annul or set it aside.⁹³

Under the English system and that of some of the states, an appeal does not remove the cause and give exclusive jurisdiction to the appellate court but is rather in the nature of a proceeding in error. Such an appeal does not stay interlocutory proceedings in the court below.⁹⁴

An appeal from the Court of Chancery to the House of Lords does not stay proceedings unless an order be made for the purpose which is in the first instance applied for to the court below.

An application to the House of Lords to appoint a receiver pending an appeal was refused on the grounds that the application ought properly to have been made to the court below.⁹⁵ If it is not the intention to remove the cause into the appellate court, it must have been intended to leave it in the court below.

"The real effect of an appeal with supersedeas is to suspend the power of the court below to make any order tending toward an execution or enforcement of the order or decree appealed from; but it does not interfere with the power of such court to make any orders necessary for the preservation of the funds or property involved in the litigation pending the appeal, when such orders do not tend towards an execution or enforcement of the order or decree appealed from, or to place the property or funds involved beyond the reach or control of the judgment or decree of the appellate court."⁹⁶

⁹² McQueen's H. of L. Practice, 236; cited, *Goode v. Wiggins* (1861), 12 O. S. 341, at 342.

⁹³ *Jenney v. Walker* (1909), 80 O. S. 100, 88 N. E. 123.

⁹⁴ *Goode v. Wiggins* (1861), 12 O. S. 342.

⁹⁵ *Wardens of St. P. v. Morris* (1804), 9 Ves. 316; *Hart v. Mayor of Albany* (1832), 3 Paige (N. Y.) 381; *Graves v. Maguire* (1837), 6 Paige (N. Y.) 379.

⁹⁶ *McKinnon-Young Co. v. Stockton* (1907), 44 So. 237, at 244, and cases cited; 53 Fla. 734, at 764.

§ 693. Effect of Petition in Error on Receivership. A petition in error filed to reverse or modify a final order or judgment in a case involving equitable rights and disposing of property brought under the control of the court does not bring the whole case before the court of error but only the order or judgment complained of in the petition in error. Provision is made to stay the execution of the final order or judgment in most states.⁹⁷ But it would be exceedingly inconvenient to extend the stay thus authorized, and it is not to be supposed that it was intended (by the statutes of Ohio) that such a stay should be extended to interlocutory orders made with the view of protecting the rights of parties or the property pending the litigation. And in analogy to appeals in like cases which do not remove the cause into the appellate court, it must have been intended to leave the court below all jurisdiction in the cause not inconsistent with the power to reverse, vacate, or modify the final order or judgment in which error is alleged. The jurisdiction thus remaining in the court below would clearly extend to the making orders usual and proper during the pendency of a litigation for the care and preservation of the property or fund, the subject of contest and under the control of the court and for the protection of the rights and interests of the parties.⁹⁸

§ 694. Peculiar Ohio Practice—Error and Appeal on Appointment of Receiver. (a) **Error Proceedings under Ohio Constitution of 1851.** A writ of error had its origin at the common law. Courts of equity are not technically courts of record and do not proceed in their trials and in their decrees according to the course of the common law.⁹⁹ On the contrary, equity courts developed in order to dispense equity in cases wherein the common law was deficient. Writs of error do not, therefore, in the absence of statute, lie in suits of equity. The method

⁹⁷ Ohio General Code, sec. 12265; Revised Statutes, sec. 6718.

⁹⁹ Springer v. Springer (1862), 43 Pa. St. 518, at 519.

⁹⁸ Goode v. Higgins (1861), 12 O. S. 341, at 343.

of reviewing decrees in chancery is ordinarily by appeal and that by the federal practice and the practice in most states, brings up the whole case and not merely the record of it. Nevertheless the legislature of Ohio when it adopted its Civil Code in 1851, provided as follows: "An order affecting a substantial right in an action when such order in effect determines the action and prevents a judgment and an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment is a final order which may be vacated, modified, or reversed as provided in this title."¹

The Supreme Court of Ohio said² in 1876, "In the Ohio Code the appointment of receivers is classed as one of the provisional remedies like the proceedings by injunction and attachment. In the state of Ohio the distinction between actions at law and rules in equity is abolished, and legal and equitable remedies are administered in the same form and under the same code of procedure." "If the order affects a substantial right, and is made in a special proceeding, it is final within the meaning of this section and may be reviewed for errors of law appearing in the record."³

It is difficult to explain the case of *Railway Company v. Sloan* and difficult to reconcile a proceeding in error taken to an order appointing a receiver in a chancery case, nevertheless the Sloan case made the law in Ohio until the Constitution of Ohio of 1851 was amended in 1912. The Constitution of Ohio of 1851 provided for appellate jurisdiction in the supreme court and in the district courts, now circuit courts, and did not provide for review of judgments in error proceedings at all, nevertheless the Ohio legislature passed statutes providing for review of cases on error and the supreme court time and again has upheld such statutes.

¹ Civil Code of Ohio of 1851, sec. 512, Ohio General Code, sec. 12258, Revised Statutes, sec. 6707.

² *C. S. & C. R. R. Co. v. Sloan* (1876), 31 O. S. 1.

³ *C. S. & C. R. R. Co. v. Sloan* (1876), 31 O. S. 1. See *State, ex rel., v. Egan* (1895), 62 Minn. 280, 64 N. W. 813, where a Minnesota statute provides for an appeal from an order affecting a substantial right.

(b) Error Proceedings under Ohio Constitution of 1851, Amended 1912. Under the Ohio Constitution of 1912, important changes have been made in the appellate power of the Ohio circuit courts of appeals and supreme court. By appellate power in this connection we mean power on appeal and on writ of error.

Article IV, sec. 6, of Ohio Constitution of 1912 provides as follows: * * * "The courts of appeal shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in the trial of chancery cases, and to review, affirm, modify or reverse the judgments of the courts of common pleas, superior courts and other courts of record, within the district as may be provided by law, and judgments of the courts of appeal shall be final in all cases, except cases involving questions arising under the Constitution of the United States or of this state, cases of felony, cases of which it has original jurisdiction and cases of public or great general interest in which the supreme court may direct any court of appeals to certify its record to that court."⁴ The jurisdiction of the Supreme Court of Ohio is provided for as follows: * * * "It shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this state, in cases of felony, on leave first obtained and in cases which originated in the courts of appeal and such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law."⁵ It has been held that, "The general assembly has no power to enlarge or limit the jurisdiction conferred by the constitution of the state on the courts of appeal of Ohio, but may provide by law for the method of examining that jurisdiction."⁶ It is clear that

⁴ Ohio Constitution as amended in 1912, art. IV, sec. 6.

⁵ Ohio Constitution as amended in 1912, art. IV, sec. 2.

⁶ The Cincinnati, etc., v. Balch (1912), 92 O. S. 415, 111 N. E. 159. See State v. Mansfield, 89 O. S. 20, 104 N. E. 1001; State v. Cameron,

under the Constitution of Ohio, as amended, 1912, "the legislature of Ohio has not now the authority to confer appellate jurisdiction upon the (Supreme Court of Ohio) court."⁷ The general schedule to the amendments to the Ohio Constitution adopted September 3, 1912, provides that all laws in force at the time of the adoption of the amendments, not inconsistent therewith shall continue in force until amended or appealed. It follows, therefore, that all laws or parts of laws that are inconsistent with these amendments are no longer in effect." The supreme court can not acquire appellate jurisdiction by the further constitutional provisions that in cases of public or great general interest, it may direct any court of appeals to certify its record to the supreme court.⁸

In reading this provision of the constitution we would be inclined to say that the words "as may be provided by law modified the whole appellate and reviewable jurisdiction and meant" such jurisdiction as may be provided by law, that is by the general assembly.⁹

Nevertheless the majority of the supreme court has held that, "The legislature under this amended section has authority to provide the method for perfecting an appeal and the procedure in error cases, but it has no power to enlarge or limit the appellate jurisdiction of the courts of appeals."¹⁰

Under the decision in *Cincinnati, etc., v. Balch*,¹¹ Ohio Gen. Code, No. 12258 must now be clearly unconstitutional, if it attempts to enlarge the power of the Court of Appeals of Ohio to review a judgment of the court below beyond the power strictly granted under the Constitution of 1912. The decision of Mr. Justice White in *C. S. & C. R. R. v. Sloan*, 31 O. S. 1, holding an order appointing a receiver, reviewable on error

89 O. S. 214, at 219-225, 106 N. E. 28; *Snyder v. Deeds*, 91 O. S. 407, 110 N. E. 1068; *Thompson v. Redington*, 92 O. S. 101, 110 N. E. 652; *Bayes v. Casualty Co.*, 92 O. S. 303, 110 N. E. 751.

⁷ *State v. Mansfield* (1913), 89 O. S. 23, 104 N. E. 1001.

⁸ *State v. Mansfield* (1913), 89 O. S. 20, at 23, 104 N. E. 1001.

⁹ See dissenting opinion of Nichols, C. J., in *Cincinnati, etc., v. Balch* (1915), 92 O. S. 415, at 421, 111 N. E. 159.

¹⁰ *Cincinnati, etc., v. Balch* (1915), 92 O. S. 415, at 417, 111 N. E. 159.

¹¹ Section 512 of the Ohio Civil Code of 1851, now Ohio General Code, sec. 12258.

proceedings, was based solely on the legislative provisions of section 512 of the Civil Code. The legislature then provided what kind of an order could be reviewed. Today under the Ohio constitution, the legislature may provide the method of procedure in error cases, but it can not provide for review of proceedings which are not made reviewable by the constitution. One must look to the words of the constitution to determine whether or not such an order is reviewable on error proceedings. "A judgment of the courts of common pleas, superior courts and other courts of record within the district may be reviewed, affirmed, modified or reversed." ¹²

The Ohio legislature has said what is a judgment and what is an order, as follows: "A judgment is the final determination of the rights of the parties in action. A direction of a court or judge made or entered in writing and not included in a judgment is an order." These statutes of Ohio providing what was a judgment and what was an order were in force when the people in 1912 passed the amendments of the Ohio Constitution. The people are presumed to know what the law is and, therefore, they knew what a judgment was in Ohio, when they passed the amendment to the constitution in 1912. It is, therefore, fair to assume that they had this definition of a judgment in mind when they voted. If an order appointing a receiver is a final determination of the rights of the parties to the action then it is possible it may be reviewable on error proceedings, if such an order is not a final determination of the rights of the parties to the action it is interlocutory and, therefore, we believe not reviewable in error in Ohio as the Constitution of Ohio now stands.

(c) Appeal Proceedings under Ohio Constitution of 1851, Amended 1912. As to the power of the court of appeals to entertain an appeal from an order appointing a receiver made by a lower court: "The court of appeals shall have * * *

¹² Ohio Constitution as amended in 1912, art. IV, sec. 6.

appellate jurisdiction in the trial of chancery cases." * * * as may be provided by law."¹³

At first reading of this paragraph we might reasonably think that the words "as may be provided by law" modified "appellate jurisdiction in the trial of chancery cases" and also meant such jurisdiction as may be provided by law, that is by the general assembly.¹⁴ Under such a reading this constitutional provision of the Constitution of 1851 except it restricts the word appellate used to mean appeals, "in the trial of chancery cases." Nevertheless the words "as may be provided by law" whether or not they modify "appellate jurisdiction in the trial of chancery cases" only means "may provide by law for the method of the exercise of that jurisdiction."¹⁵ The Supreme Court of Ohio in construing this provision held in effect that the general assembly no longer had the power to provide generally for the appeal of a cause or proceeding.¹⁶

Therefore, this amended section of the constitution of the state does not authorize the legislature to grant any jurisdiction, original or appellate, to the courts of appeal but on the contrary specifically confers on these courts appellate jurisdiction "in the trial of chancery cases."¹⁷ Do the words standing alone, "appellate jurisdiction in the trial of chancery cases," give a right to appeal from an order appointing a receiver? No other case can be found wherein this question has been flatly adjudicated. It is impossible to say what interpretation the supreme court will put upon those words of the Ohio Constitution; suffice it to say, however, that both the legislature and the courts of the different states seem to be leaning toward permitting an appeal from an order ap-

¹³ Ohio Constitution of 1851, as amended in 1912, art. IV, sec. 6.

¹⁴ *Cincinnati, etc., v. Balch* (1915), 92 O. S. 415, at 421, 111 N. E. 159.

¹⁵ *Cincinnati, etc., v. Balch* (1915), 92 O. S. 415, at 421, 111 N. E. 159.

¹⁶ *Snyder v. Deeds* (1914), 81 O. S. 407, 110 N. E. 1067; cited by Nichols, C. J., in *Cincinnati, etc., v. Balch* (1915), 92 O. S. 415, at 422, 111 N. E. 159.

¹⁷ *Cincinnati, etc., v. Balch* (1915), 92 O. S. 415, at 417, 111 N. E. 159.

pointing a receiver when such appointment affects a substantial right of a litigant, and is in effect a final order.¹⁸

While this work is going to print a case is pending in the Supreme Court of Ohio,¹⁹ in which the question for determination by the court is whether an appeal will lie to the Court of Appeals of Ohio as now constituted by the Amended Constitution of 1912, from an order of the court of common pleas fixing the compensation of a receiver and directing the payment of same out of the funds in his hands after judgment rendered on the merits between the parties in an action to administer the assets of the corporation as a trust fund for the benefit of creditors. It is highly probable this case may be helpful in determining the question of appealability generally of orders made in chancery cases.

§ 695. Consolidation of Two Cases and Discharging One Receiver. If two proceedings over the same res, against the same defendant, both being instituted by parties under the same right to the cause of action, are pending in the same court, upon such being brought to the notice of the court, the court may consolidate the two causes or discharge one of its receivers according to the exigencies of the case.²⁰

§ 696. Foreclosure of Property in Receivership by Crossbill. When property is placed in the hands of a receiver under a general creditor's bill²¹ or a judgment creditor's bill²² a mortgagee may afterward intervene and ask that he be allowed to foreclose his mortgage.²³

§ 697. Procedure by Intervention. See subject discussed and treated under ch. XXVII, *infra*, "Intervention and Presentation of Claims."

¹⁸ See sec. 683, *supra*.

¹⁹ Thompson, et al., v. Denton (1917), 95 O. S. 333.

²⁰ Young v. Hamilton (1910), 135 Ga. 339, at 348, 69 S. E. 593, citations.

²¹ Sage v. Memphis, etc., Ry. (1888), 125 U. S. 361, 31 L. ed. 694.

²² Haehnlen v. Drayton (1911), 192 Fed. 302.

²³ Haehnlen v. Drayton (1911), 192 Fed. 302.

§ 698. Procedure by Third Parties Claiming Property Held by Receiver. See subject discussed and treated under ch. XXVII, *infra*, "Intervention and Presentation of Claims."

- (a) **Procedure by Lien Creditors—Generally.** See ch. XXVII.
- (b) **Procedure by Holder of Vendor's Lien.** See ch. XXVII.
- (c) **Procedure by Mortgage Creditors.** See ch. XXVII.
- (d) **Procedure by Judgment Creditors.** See ch. XXVII.
- (e) **Procedure by Unsecured Creditors.** See ch. XXVII.
- (f) **Procedure by Secured Creditors.** See ch. XXVII.
- (g) **Procedure by Stockholders of Corporation.** See ch. XVI.

CHAPTER XXVI

SUITS RELATING TO PROPERTY IN RECEIVER'S POSSESSION

ANALYSIS

SUITS—GENERALLY

- § 699. No Cause of Action Vests Absolutely in Receiver Except by Statute.
- § 700. Pending Suits as Affected by Appointment of Receiver.
- § 701. Pending Suits Proceeding without Receiver's Interference.
- § 702. Receivers May Obtain Leave to Appear in Pending Suit.
- § 703. Receivers May Get Leave to Be Added Party in Pending Suit.
- § 704. Receivers May Get Leave to Be Substituted Party in Pending Suit.
 - Receiver Carrying on Pending Infringement Suit.
- § 705. Effect of Judgment in Pending Suit on Receiver's Funds.
 - Enforcement of Such a Judgment against Receiver.
- § 706. Filing Claim with Receiver when Suit Is Already Pending.
- § 707. Suits to Garnishee or Attach Money in Receiver's Hands.
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- § 709. Suits against Company Whose Property Is in Receiver's Hands.

SUITS AGAINST RECEIVER

- § 710. Federal Statutes Permitting Suits against Receiver.
- § 711. State Statutes Permitting Suits against Receiver.
- § 712. Intervention by Claimants against Receiver.
- § 713. Leave of Court Necessary to Bring Suit by and against Receiver.
 - (a) Receiver Sued without Leave for Acts outside His Authority.
 - (b) Failure to Obtain Leave to Sue Receiver Does Not Affect Jurisdiction.
- § 714. Suits against Receiver Ancillary to Main Action.
- § 715. Suits against Receiver in His Official Capacity.
- § 716. Venue of Suits against Receiver.
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- § 718. Process and Appearance in Suits against Receiver.
 - Service against Receiver of Corporation Same as against Corporation.
- § 719. Suits against Receiver Concerning Property Which Has Come into His Possession.
- § 720. Foreclosure Suits against Property in Receiver's Hands.

§ 721. Suits against Receiver for Tort of Defendant Corporation.

Suits against Receiver for Tort of Defendant in Name of Defendant and Receiver.

§ 722. Suits against Receiver for Contracts of Defendant.

§ 723. Receiver Can Only Make Defense of Defendant.

§ 724. Suit against Receivers and Others Jointly.

SUITS BY RECEIVER

§ 725. Federal Statutes Permitting Suits by Receiver.

§ 726. State Statutes Permitting Suits by Receiver.

§ 727. Leave of Court Necessary for Receiver to Sue.

§ 728. Authorization to Receiver to Sue by Order of Appointment.

§ 729. Effect of Granting Receiver Leave to Sue.

§ 730. Receiver Not Forced to Sue without Indemnity.

§ 731. Receiver Can Not Sue Parties to the Main Suit.

§ 732. Suits by Receiver Ancillary to Main Suit.

§ 733. Suits by Receiver in Official Capacity.

§ 734. Claims by Receiver, where Litigated.

§ 735. Summary and Plenary Suits by Receiver.

Summary Action by Court against One Not a Party.

§ 736. Suits by Receiver at Law and in Equity.

§ 737. Choses in Action Passing to Receiver.

§ 738. Trover or Conversion Suits Brought by Receiver.

§ 739. Suits by Receiver to Collect Assets.

§ 740. Suits by Receiver to Collect Unpaid Stock.

§ 741. Suits by Receiver Concerning Property in His Possession.

§ 742. Suits by Receiver to Avoid Contracts of Defendant Corporation.

§ 743. In Whose Name Suit by Receiver Is Brought.

Suits by Receiver of Lessor in Name of Lessor.

§ 744. Setoff or Counterclaim against Receiver's Claim.

SUITS—GENERALLY

§ 699. **No Cause of Action Vests Absolutely in Receiver Except by Statute.** If any debt is due the defendant and a receiver is appointed to receive that debt, there is no absolute vesting in him of any cause of action which was due the defendant.¹ Whatever cause of action the defendant had still remains in the defendant.² Yet the right to enforce a chose in action

¹ Rochester Tumbler Works v. M. Woodbury Co. (1913), 215 Mass. 194, at 198, 102 N. E. 438.

² It is said by some courts that choses in action do pass to the receiver, Peck v. Elliott, 79 Fed. 10, at 11; 24 C. C. A. 425; Knebeler v. Haines (1910), 229 Pa. St. 274, at

278, 78 Atl. 141. We do not think this is strictly true but that the receiver takes his authority to collect choses in action by operation of law, White v. Ewing (1894), 159 U. S. 36, at 40, 40 L. ed. 67, 15 S. C. Rep. 1018.

vests in the receiver.³ The receiver in such a case without the assistance of a statute could not maintain an action either at law or in equity in his own name to enforce the payment of the money owed to the defendant in the receivership suit.⁴ The only mode by which an obligation due the receivership from a third party if a party to the receivership case can be enforced against that third party would be by a proceeding in the receivership action for contempt, to compel his obedience to the charging order of the court and according to the ordinary practice, such a proceeding would be taken, not by the receiver but either by the plaintiffs or by the codefendants, that is by the person who is interested in the enforcement of the order. There is no debt from the third party due the receiver, consequently he in his own name is not a good petitioning creditor.⁵ Courts of equity can not transfer title to property by decree, unless authorized by statute although they can compel the defendant to transfer title.⁶

“There may, no doubt, be exceptional cases in which a receiver can bring an action in his own name, when for instance, he is the holder of a bill of exchange. In that case he can maintain an action not because he is a receiver, but because he is the holder of the bill. So if he is possessed of chattels as receiver, and those chattels are unlawfully detained from him, he may well be able to maintain an action to recover them as being the person in possession of them quite independently of the fact that he is receiver. And there may be other cases in which, having an independent cause of action, the fact that he is receiver does not disqualify him from suing. But in such cases he does not sue in his character of receiver.”⁷

If the property in controversy is in the possession of a third person who claims the right of possession, the plaintiff may

³ Porter v. Sabin (1892), 149 U. S. 473, at 478, 37 L. ed. 815.

⁴ Wilson v. Welch (1892), 157 Mass. 80, 31 N. E. 712.

⁵ In re Sacker (1888), 22 Q. B. D. 179, at 185.

⁶ Wilson v. Martin (1890), 151 Mass. 515, 24 N. E. 784.

⁷ Fry, L. J., In re Sacker (1888), 22 Q. B. D. 179, at 185.

make him a party to the suit and thus render him subject to an order of the court in regard to delivering such property to the receiver.⁸ Or the plaintiff or receiver, at times, may make application to the appointing court and get an order to the receiver to bring a plenary suit in the appointing court or in another court to get in the property in controversy.

A receiver, except by statute, must bring the action in the name of the legal owner, in the name of the person in whom the right of action existed before the appointment,⁹ for the reasons set out above, and the real owner being a party to the suit in which the receiver is appointed will be compelled to allow the use of his name upon being properly indemnified out of the estate, and effects under the control of the court.¹⁰

An appointment of a receiver does not, apart from a statute or an order of court, make him so far the representative of the corporation that he can bring suit for it in his own name,¹¹ or can bind it by admissions in pais made outside of the performance of his official duties.¹²

§ 700. Pending Suits as Affected by Appointment of Receiver. The appointing of a receiver over the assets of a corporation has no direct effect on pending actions against the corporation unless the appointing court enjoins such actions or otherwise affects them, or unless the state or federal statutes make such appointment directly affect such actions. The same rule applies to actions pending against individuals whose property is placed in the hands of a receiver.^{12a}

The appointment of a receiver has this indirect effect upon pending actions. If the plaintiff in such an action wants a judgment against the defendant corporation for some purpose

⁸ *Parker v. Browning* (1840), 8 Paige 388.

⁹ *Garver v. Kent* (1880), 70 Ind. 428; *Moriarity v. Kent* (1880), 71 Ind. 601; *Rochester Tumbler Works v. M. Woodbury Co.* (1913), 215 Mass. 194, at 198, 102 N. E. 438.

¹⁰ *Daniels Ch. Pr.*, 1977, at 1991; *Battle v. Davis* (1872), 66 N. C. 256.

¹¹ *Rochester Tumbler Works v. M. Woodbury Co.* (1913), 215 Mass. 194, at 198, 102 N. E. 438.

¹² *Fort Payne C. & I. Co. v. Webster* (1895), 163 Mass. 137, 39 N. E. 786.

^{12a} See *American Steel Foundries v. Chicago R. I. & P. Ry. Co.* (1915), 231 Fed. 1003.

other than a right to share in the assets, in the hands of the court he could go on with his action. But if he wishes to establish his right to share in the assets in the possession of the appointing court, the further prosecution of that action will not help him. To establish that right to share in the assets he must prove his claim in the appointing court to get an order from the appointing court to the effect that a judgment in the action in the foreign court should establish his right to share in the assets in the possession of the appointing court. It is for the court which has taken the assets of the defendant into its hands for distribution and for that court alone to determine who its creditors are and what is due to them respectively.¹³

In cases of suits pending at time of appointment there are several courses open to the receiver:

First. Allow suit to come to trial without interference.

Second. Apply to court for authority to conduct suit in name of individual or corporation.

Third. Apply to court for authority to be made a party defendant and protect rights of general creditors.

Fourth. Apply to court for authority to be substituted as party instead of the individual or corporation.

§ 701. Pending Suits Proceeding without Receiver's Interference. Until judgment by a court of competent jurisdiction dissolving a corporation or until the corporation is dissolved by some way prescribed by the sovereign power which created the corporation, the corporation continues to exist and if no injunction has been issued against suits being prosecuted against the corporation, it would seem that suits could be prosecuted to judgment without the receiver taking part in the suit.¹⁴ The same principle applies to a receiver

¹³ Attorney General v. Supreme Council A. L. H. (1907), 196 Mass. 151, 81 N. E. 966. State statutes may provide for abatement of suits or otherwise, Hunt v. Insurance Co. (1887), 55 Me. 290, at 295.

¹⁴ Kincaid v. Dwinelle (1875), 59 N. Y. 548; Pine Lake Iron Co. v. La Fayette Car Wks. (1893), 53 Fed. 853. See Venner v. Denver Union Water Co. (1907), 40 Colo. 212, 90 Pac. 623, at 629, when the

over property of an individual. The individual does not die legally when a receiver is appointed over his property.

When a receiver is appointed *pendente lite* of the property of an individual the receiver does not personally become liable for the obligations of the party, but the individual himself remains liable after the receivership as before and in the case of a corporation, it remains liable after as before and when a corporation is dissolved, statutory provisions are made for collecting liabilities. This being so, the suit may continue against the original party, individual or corporation.

It has been held that the receiver of a national bank after his appointment is the proper, but not a necessary party to an action against the bank pending in a state court at the time of his appointment, and while he may properly be admitted as a party on his application, to control the defense of his trust, such admission as a party does not give him a right to remove the cause to a federal court.¹⁵

§ 702. Receivers May Obtain Leave to Appear in Pending Suit. A receiver not having title to the defendant's property except given title by statute is not always a necessary party to suits concerning the defendant or his property. However, when it appears necessary for the due protection of the property in the hands of a receiver, and the due administration of the trust committed to his charge that a suit pending either for or against the defendant in the receivership suit be properly conducted, the receiver may apply to the appointing court and get leave to appear in and without technically becoming a party conduct or prosecute or defend such suit in the name of the defendant.¹⁶

In such a suit the prosecution or defense is made in the name of the defendant and all pleadings are signed by the defendant, or if a corporation, by the defendant company, by

Colorado court held that the appointment of a receiver of a water company by the New Jersey courts did not affect in any manner actions theretofore commenced against the company in Colorado.

¹⁵ *Specker v. German Nat. Bank* (1899), 98 Fed. 151.

¹⁶ *Rochester Tumbler Works v. M. Woodbury Co.* (1913), 215 Mass. 194, at 198, 102 N. E. 438.

its duly constituted officers¹⁷ or by the name of the defendant by its receiver.¹⁸ When a receiver is appointed to take charge of and operate a railway this is the method of procedure generally adopted.

The order appointing the receiver does not change the character of the parties to a contract; it gives merely the power to protect the interests of all parties to the property, or fund in controversy.

A receiver appointed by the Circuit Court of the United States for the Southern District of Ohio, to take possession of a railroad and its effects, may sue in the Superior Court of Cincinnati upon a contract made by that corporation in the corporate name of the railroad without disclosing in the petition his own name as receiver. If there should be a recovery by the plaintiffs it will be by their corporate name and the receiver, upon proper application to the court, would be allowed to control the process and collect the amount due, to carry out more fully the purpose of his appointment.¹⁹

§ 703. Receivers May Get Leave to Be Added Party in Pending Suit. Although a receiver *pendente lite* does not get title to the property of the individual or corporation, nevertheless he administers the trust. A judgment against the individual or corporation in the absence of fraud or collusion will establish the existence and extent of the obligation.²⁰ Therefore if the suit is not properly and adequately defended by the individual or corporation the receiver ought to be made a party defendant and employ counsel and defend the suit. Such a proposition seems elementary.

To be made a party defendant needs the order of the court in which the suit is pending and the receiver must show his interest in the cause before he can be made a party defendant.

¹⁷ *Fort Payne, etc., v. Webster* (1895), 163 Mass. 134, 39 N. E. 786.

¹⁸ *Rochester Tumbler Works v. M. Woodbury Co.* (1913), 215 Mass. 194, at 198, 102 N. E. 438.

¹⁹ *Storer, J., in O. & M. R. R. Co. v. I. & C. R. Co.* (1866), 5 Am. Rep. 733. See also 3 Ohio Dec. Rep. 458.

²⁰ *Pringle v. Woolworth* (1882), 90 N. Y. 502, at 512.

When receivers intervene in an action pending in any court they occupy then the position of any other litigant.²¹

§ 704. Receivers May Get Leave to Be Substituted Party in Pending Suit. When a corporation expires by limitation of its charter or by dissolution by a court of competent jurisdiction, and a case is pending by or against the corporation as party plaintiff, the receiver of said corporation may be substituted party plaintiff.²²

When a corporation is wound up the court may restrain all persons from bringing or prosecuting suits against the company until further orders of court.²³

The old corporation is no longer in existence and has no life whatever. Before the statute vesting the property in the receiver and before other statutes were passed that no suit shall abate by the dissolution of a corporation or otherwise,²⁴ there were cases which abated by the legal death of the corporation.²⁵ This is no longer possible.

Receiver Carrying on Pending Infringement Suit. When authority has been given to the receiver to sue on an infringement suit already commenced and the company defendant was required and did assign all its rights in the patents and in past infringements and the court of another jurisdiction recognized the title of the receiver and authorized him to file a supplemental bill in the original proceedings already taken and to prevent delay and expense to both parties, such receiver was held to have the right to carry on such infringement litigation.²⁶

§ 705. Effect of Judgment in Pending Suit On Receiver's Funds. When a judgment is secured in a pending suit in the

²¹ Arnold v. Weiner (1894), 40 Neb. 216, at 225, 58 N. W. 709.

²² Houston v. Redwine (1890), 85 Ga. 130, 11 S. E. 662.

²³ Phoenix Fdry. & M. Co. v. Muth River Const. Co. (1884), 33 Hum. 156; Attorney General v. Guardian Mut. Life Ins. Co. (1879), 77 N. Y. 272.

²⁴ General Code of Ohio, sec. 11964; General Statutes of Connecticut of 1902, ch. 198, sec. 3396.

²⁵ Metropolitan Rubber Co. v. Place (1906), 147 Fed. 93.

²⁶ National E. Signalling Co. v. Telefunken W. Tel. Co. (1913), 208 Fed. 679.

name of the individual or corporation, the receiver upon proper application to the court, will be allowed to collect the amount due to carry out more fully the purpose of his appointment. On the other hand if judgment exists against the defendant, when the receiver is appointed or is recovered during his appointment, that judgment if allowed to stand must ordinarily be conclusive as to the amount of the claim, except in cases where newly discovered evidence may show that the court giving judgment was imposed upon.²⁷ A judgment existing at the time of the appointment may be a lien on the property, but a judgment obtained against the individual or corporation after the appointment of a receiver can not be a lien.

Said La Combe, J.,²⁸ in the famous New York City Railway Co. Receivership: "The court does not undertake to restrain claimants whose claims were in suit before receivership or have since been sued upon, from prosecuting such claims to judgment against the defendant; but except in cases where some lien on the property was acquired before receivership, it is only the claims that have been proved before the special master which will be entitled to share in whatever dividend may be distributed when the assets or their proceeds are marshalled."

"A judgment against the company would establish as against the receiver the amount of the debt or claim of the plaintiff in such suit and ordinarily the receiver would have no right to reagitate questions litigated in the action against the individual or corporation or interpose any defense on the merits which defense might have been taken in the action in which the judgment was rendered. The receiver holds the property and estate of the individual or corporation as the officer of the court for the purpose of distribution under the direction of the court among creditors and stockholders

²⁷ *Pennsylvania Steel Co. v. Street Ry.* (1908), 161 Fed. 785. See *v. Axtell, etc.* (1887), 84 Va. 231, at 236, 4 S. E. 587.
²⁸ *Pennsylvania Steel Co.* (1908), 161 Fed. 787.

and in the absence of fraud or collusion the receiver and other creditors are bound thereby.”²⁹

Enforcement of Such a Judgment against Receiver. When a suit is pending and by order of the appointing court the receiver is allowed to become a party in that pending suit and a judgment is entered against the receiver as such, such judgment ordinarily does not give the owner of the judgment a preference over like claimants who have simply presented their claims to the receiver and had them allowed. The judgment simply fixes the amount which will generally be accepted by the appointing court and the holder of the judgment allowed to come in and share in any fund administered by the appointing court.³⁰

It was held in *Denton v. Baker*:³¹ “The holder of a judgment against an insolvent national bank, recovered upon a claim rejected by the receiver, has an adequate remedy by an action at law against the receiver by the judgment in which the latter may be directed to recognize the claim and he can not resort to equity to compel the allowance of the claim by the receiver or enjoin its rejection.

It is hard to reconcile this decision with the theory of receivership and the rule that the property is in the custody of the court and suits can not be brought to interfere with that custody except by permission of the court appointing the receiver. Furthermore the receiver holds the property and estate of the corporation as the officer of the court for the purpose of distribution under the direction of the appointing court, among creditors and stockholders.³²

Has one court not a reviewing court any jurisdiction to decree that the claim or judgment of the plaintiff shall be allowed as a valid claim, or of a preferred claim or any

²⁹ *Pringle v. Woolworth* (1882), 90 N. Y. 502; *Denton v. Baker* (1897), 79 Fed. 189.

³⁰ *National Bank of Augusta v. Stillwell* (1915), 101 S. C. 453, 86 S. E. 21.

³¹ *Denton v. Baker* (1897), 79 Fed. 189.

³² *Pringle v. Woolworth* (1882), 90 N. Y. 502, at 511.

claim at all? Can one court decree that the officer of another court shall allow a claim or pay a judgment?

In the event that the court appointing the receiver should not be willing to abide by the decree of the other court, what step could the other court take?

It is not to be understood that one court may advise another court of co-ordinate jurisdiction.³³ It would seem that a party holding a judgment which should properly be paid out of the property or fund in the hands of a receiver, should intervene in the cause in which the receiver is appointed and be allowed to prosecute and prove his claim. An order for distribution is a final order, if the claim is refused an appeal or writ of error will usually lie.

Where such claims have passed into judgment with the receiver's knowledge, they should be regarded as established.³⁴

§ 706. Filing Claim with Receiver When Suit Is Already Pending. A time having been fixed by order of the court within which claims should be filed, the intervenor could not omit presenting his demand without great risk of losing it. He can not present the judgment because it is not yet rendered. He might, of course, make reference to the suit pending, but his failure to do so, provided the receiver and his counsel had knowledge of the pendency of the suit was not considered as a waiver of the right to prosecute the action.³⁵

§ 707. Suits to Garnishee or Attach Money in Receiver's Hands. Just as an execution can not be enforced against property in the hands of a receiver,³⁶ so an attachment will not lie against moneys in the hands of a receiver.³⁷ The

³³ Schell v. Huseman (1897), 7 Ohio N. P. 166. See United States v. Illinois Surety Co. (1917), 238 Fed. 840.

³⁴ De Mott v. Stockton Paper Ware Mfg. Co. (1880), 32 N. J. Eq. 124.

³⁵ Pine Lake Iron Co. v. La Fayette (1893), 53 Fed. 853.

³⁶ Wiswall v. Sampson, 14 How. 64, see sec. 767, *infra*; 14 Law Ed. 322.

³⁷ Adams v. Haskell, 6 Cal. 113; In re John L. Nelson & Bro. Co. (1907), 149 Fed. 592, see sec. 767, *infra*.

reason is the same because an enforcement of the levy either of the attachment or of the execution would constitute a contempt of court.³⁸

The custody of a receiver is the custody of the court, and the law is well settled that no one can lawfully sue him without leave of the court which appointed him. Garnishee proceedings against property in receiver's hands are in contempt of court.³⁹ It would lead to great confusion if such an officer were to be subject or even to be at liberty to take the funds in his official custody into any other tribunal, which could have no power to discharge him, to settle his accounts, or to punish him for collusion.⁴⁰ If justice requires leave to sue the court may be presumed will grant it.⁴¹ The Supreme Court of the United States said in 1872:⁴² "Where property in the hands of a receiver is claimed by another, the right may be tried by proper issues at law, by a reference to a master, or otherwise, as the court in its discretion may see fit to direct."

Paragraph 66 of the Judicial Code of 1911 provides as follows: "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, with the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."⁴³

³⁸ *In re John L. Nelson & Bro. Co.* (1907), 149 Fed. 592.

³⁹ *Richards v. The People* (1876), 81 Ill. 551, at 555.

⁴⁰ *Sievers v. Woodburn S. W. Co.* (1880), 43 Mich. 276, 5 N. W. 311; *Tremper v. Brooks* (1879), 40 Mich. 333, at 335; *Tremper v. Brooks* (1879), 40 Mich. 333, at 335.

⁴¹ *Vari Bianchi v. Wayne, C. J.*, (1900), 124 Mich. 462, 83 N. W. 26; *Cohnen v. Sweeney* (1895), 105 Mich. 643, at 645, 63 N. W. 641;

Ackerman v. Ackerman, 50 Neb. 60, 69 N. W. 388; *Flemthaw v. Steward*, 45 Neb. 640, 63 N. W. 924; *Yeiser v. Cathers* (1903), 97 N. W. 840, 5 Neb. (unof.) 204.

⁴² *Davis v. Gray* (1872), 16 Wall. 203, at 218, 21 L. ed. 447.

⁴³ Act of March 3, 1887, ch. 373, sec. 3, 24 Stat. 554; Act of August 13, 1888, ch. 866, sec. 3, 25 Stat. 436; Act of March 3, 1911, c. 231, sec. 666, 36 Stat. 1104.

This statute as amended in 1888 was construed, 1894, by Lurton, C. J., who says:⁴⁴ "Garnishment proceedings are not suits against the receiver for any act or transaction of his and such claims must be prosecuted in the manner heretofore settled by order in this cause. Such claims filed with the commissioner appointed to hear them can be thus more speedily and economically determined than by the institution of regular suits." Again in 1911, Killits, D. J., for the Northern District of Ohio construes the same statute and says: "Receivers are appointed by a court in chancery and an action in attachment is a proceeding at law. It is easy to understand why in the absence of statutory authority a court in chancery will not permit its operation to be interfered with by proceedings at law."

It seems very clear to the court that the respondents had no right to drag the receiver, an officer of this court, into the suit they had against Scott, by the ancillary process of garnishment, and the receiver was well within his rights and incurred no responsibility whatever when he ignored the service. The garnishment was a mere nullity and consequence, all subsequent proceedings by the respondents were nullities, so far as they attempted to affect the receivership."⁴⁵

§ 708. Appointment of Commissioner to Hear Garnishment and Attachment Proceedings. "Where property in the hands of a receiver is claimed by another, the right may be tried by proper issues at law, by a reference to a master, or otherwise as the court in its discretion may see fit to direct."

Garnishment proceedings are not suits against the receiver for any act or transaction of his and such claims must be prosecuted in the manner settled by order of the appointing

436; Act of March 3, 1911, ch. 231, sec. 66. 36 Stat. 1104.

⁴⁴ Central T. Co. v. East Tennessee, etc. (1894), 59 Fed. 523; followed in Comer v. Felton, 61 Fed. 731. See also Central Trust Co. v.

Wheeling & L. E. R. Co. (1911), 189 Fed. 82, at 85. See 13 L. R. A. (N. S.) 758.

⁴⁵ Central Trust Co. v. Wheeling & L. E. R. Co. (1911), 189 Fed. 82, at 85.

court. The practice in the United States courts if not in state courts is for the appointing court upon proper application to appoint a commissioner of the court in the pending cause for the purpose of hearing and considering and determining all garnishment and attachment proceedings taken or intended to be taken against any employee or other creditor of the receiver when the object is to attach or garnishee the property in the hands or custody of the receiver or moneys due from the receiver as such to his employees or other creditors.

§ 709. Suits against Company Whose Property Is in Receiver's Hands. If one has a claim against a railway company that has gone into the hands of a receiver, and the company is not dissolved, the claimant may sue the company in any court of competent jurisdiction, provided the court appointing the receiver has made no injunction against suits being brought and provided permission of the court is obtained to bring the suit. If such suit is brought and service of process shall be made upon any local agent of the receivers, the receivers should appear and defend for the railway company. Any judgment obtained should be certified to the court appointing the receiver for payment.⁴⁶ If suit is brought in a state other than that in which the receiver is appointed, the receiver may be made a party, but if he is not made a party that fact will not make judgments against the corporation void.⁴⁷

SUITS AGAINST RECEIVER

§ 710. Federal Statutes Permitting Suits against Receiver. For an outline of federal statutes permitting suits against receiver, see ch. XXXV, Vol. II, *infra*.

§ 711. State Statutes Permitting Suits against Receiver. For an outline of state statutes permitting suits against receiver, see ch. XXXV, Vol. II, *infra*.

⁴⁶ *In re Seaboard Air Line* (1909), 166 Fed. 376, at 378. See *North Carolina doctrine cited in Hollowell v. Railway Co.* (1910), 153 N. C. 19, at 21, 68 S. E. 894.

⁴⁷ *Venner v. Denver Union Water Co.* (1907), 40 Colo. 212, 90 Pac. 623, at 629.

§ 712. **Intervention by Claimants against Receiver.** For a discussion of the subject of intervention, see ch. XXVII.

§ 713. **Leave of Court Necessary to Bring Suit by and against Receiver.** The possession of the court of property through its receiver is the possession of the sovereign power or government acting through the courts. Any interference with the court's possession is contempt of court and may be punished by the court or enjoined.⁴⁸ A suit against the receiver affecting property in his hands is contempt of court unless brought under the statutes, state or federal, permitting such suit.⁴⁹ It is, however, not usual for the court to refuse leave unless it is perfectly clear that there is no foundation for the demand.⁵⁰

When one claims a right against the property in the hands of a receiver, it is discretionary with the court to allow such claimant to bring suit against the receiver and so test the right. However, there may be an abuse of the court's discretion. A landlord may for instance have a right which the court can not properly disregard to have his claim to the possession of the property passed upon and determined and if found valid has a right to be restored to the immediate possession of the property. That right the court must recognize and protect, notwithstanding the existence of the receivers and creditors.⁵¹

Since choses in action do not vest in a receiver, he has no right to bring an action concerning property which never came into his possession. Even after he has obtained possession of property, the receiver is the officer of the court. The property is in the custody of the court and before the receiver brings a suit involving that property, he should ask permission of

⁴⁸ *Kennedy v. I. C. & L. R. Co.* (1880), 3 Fed. 97. See where statute displaces rule in *United States v. Illinois Surety Co.* (1917), 238 Fed. 840, at 842.

⁴⁹ *Durand & Co. v. Howard & Co.* (1914), 216 Fed. 585, at 588; *Gunning v. Sorg* (1905), 214 Ill. 616,

at 622, 73 N. E. 870.

⁵⁰ *Durand & Co. v. Howard & Co.* (1914), 216 Fed. 585, at 588.

⁵¹ *O'Dell v. H. Batterman Co.* (1915), 223 Fed. 292, at 299. See also 166 Fed. 376.

the court appointing him.⁵² On the other hand to bring suit against a receiver without statutory or court permission is contempt of the court appointing the receiver.

There are, however, statutes which permit a receiver bringing and defending action in his own name⁵³ without first obtaining leave of the appointing court.⁵⁴ The United States statutes gives a litigant the right to sue a receiver without leave of court and it is not necessary for him to travel to the forum of the appointing court to ask permission.⁵⁵

It is the practice in some jurisdictions for the court appointing the receiver not to enjoin suits against the receiver, but to provide by order that permission must be had and obtained from the court and four days' notice given of such application.⁵⁶

(a) Receiver Sued without Leave when Acts Outside of His Authority. Said the Supreme Court of Alabama: "It is axiomatic, also, that if a receiver does something outside of his duties as receiver or takes possession of property which the court has not authorized him to take possession of, he can not claim the protection of the court against a suit brought against him on account of the same. The only object in committing this power and discretion to the court is in order that it may have full control of the property which it has taken possession of through its receiver and not to protect the receiver in traveling beyond the line marked out for him by the court and interfering with the property rights of individuals."⁵⁷

(b) Failure to Obtain Leave to Sue Receiver Does Not Affect Jurisdiction. A court which holds and administers an estate through the receiver as its officer must decide whether it will determine for itself all claims against the estate or allow any of them to be litigated in other courts.⁵⁸ But failure

⁵² Metropolitan Trust Co. v. North Carolina Lumber Co. (1908), 162 Fed. 170, at 179; Kennedy v. I. C. & L. R. Co. (1880), 3 Fed. 97.

⁵³ Ohio General Code, sec. 11897.

⁵⁴ Vernon Sayles' Texas Civil Stat. of 1914, art. 2146.

⁵⁵ U. S. Jud. Code, sec. 66; 36 Stat. at L. 1104; U. S. Comp. Stat. (1916), sec. 1048. See Erb v. Monasch (1900), 177 U. S. 584, 44 L. ed. 897, 20 S. Ct. Rep. 819.

⁵⁶ National Bank of Augusta v. Stillwell (1915), 86 S. E. 21, 101 S. C. 453.

⁵⁷ Brooke v. Kettler (1910), 51 So. 940, 166 Ala. 76.

⁵⁸ American Steel & Wire Co. v. Bearnse (1907), 194 Mass. 596, at 600, 80 N. E. 623; Porter v. Sabin, 149 U. S. 473, 37 L. ed. 815, 13 S. Ct. Rep. 1008; Porter v. Kingman, 126 Mass. 141.

to obtain consent of the court to sue the receiver does not affect the jurisdiction of the court as to the subject-matter, and the jurisdiction of the person of the receiver may be waived save an exceptional condition⁵⁹ as shown in *Barton v. Barbour*, 104 U. S. 126, 131, 26 Fed. 672, 675, and *Conner v. Felton*, 10 C. C. A. 28, 28 U. S. App. 313, 61 Fed. 731, 737.

§ 714. Suits against Receiver Ancillary to Main Action.

Actions against a receiver both for the recovery of debts, which existed at the time when he was appointed and as incidental to the distribution of the property in the hands of the receiver, that is on account of the receiver's contracts, misfeasances, negligences and liabilities, are ancillary to the original suit.⁶⁰ In the case of a federal court receivership, such suits may be brought in the state courts or they may be brought in the federal court in which the receiver was appointed, and that notwithstanding that no federal question is involved, and there is no diversity of citizenship.⁶¹

§ 715. Suits against Receiver in His Official Capacity.

A receiver is the officer of the court, yet he is not strictly speaking the agent of the court. Not being strictly speaking the agent of the court, the court can not be held responsible for his acts; furthermore the court is an arm of the sovereignty and on that ground can not be responsible; and furthermore if the court were held responsible and unless the sovereignty had laid aside or appropriated funds it is hard to see how the court could respond in damages.

The acts and contracts of a receiver according to the English law are his own and he is primarily responsible for them although he may in certain cases look to the fund in court for his indemnity.

⁵⁹ *Ambrose v. Brown* (1914), 42 D. C. App. 25.

⁶⁰ *Gableman v. Peoria, etc.*, 179 U. S. 335, at 342, 45 L. ed. 220, 21 S. C. Rep. 171; *Coffee v. Gay*

(1914), 67 So. 681, 191 Ala. 137; *White v. Ewing*, 159 U. S. 36, 40 L. ed. 67.

⁶¹ *Betts v. Bisher* (1914), 213 Fed. 581, at 582.

The American courts have evolved and developed the theory that a receiver is responsible for his torts and contracts and at times the torts and contracts of his agents in the receiver's official capacity or character. Accordingly suits are frequently filed in American cases against the receiver as such.⁶²

§ 716. Venue of Suits against Receiver. The rule established by the federal courts as to the venue of actions or suits against receivers is that "while actions against receivers may be brought in the state courts, they may also be brought in the court in which the receiver was appointed, and that, notwithstanding that no federal question is involved and there is no diversity of citizenship, those courts have jurisdiction upon the ground that the actions are ancillary to the original suit, and that the judgments recoverable thereon are payable from the property in the course of administration."⁶³

It is generally considered to be a matter within the discretion of the court whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere.⁶⁴

"Furthermore," said the Supreme Court of Virginia, 1887, "A verdict rendered upon a trial of an issue out of chancery, stands upon a very different footing from a verdict rendered upon an issue *devisavit vel non*, or in an action at common law, the reason being that in the former case, the issue is a mere incident of the proceedings, intended to satisfy the conscience of the chancellor, who may therefore approve the verdict, or disregard it altogether according to what in his

⁶² *McNulta v. Lochridge*, 141 U. S. 327, 332; *Gray v. Grand Trunk Western Ry. Co.* (1907), 156 Fed. 736, at 743. See ch. XXIX, *infra*.

⁶³ *Betts v. Bisher* (1914), 213 Fed. 581, at 583, citing *Gableman v. Peoria Ry. Co.* (1900), 179 U. S. 335, at 342, 21 Sup. Ct. 171, 45 L. ed. 220, 21 S. C. Rep. 171.

⁶⁴ *Durand & Co. v. Howard & Co.* (1914), 216 Fed. 585, at 588; *Ken-*

nedy v. Illinois Central & L. R. Co. (1880), 3 Fed. 97; *Werner v. Murphy* (1894), 60 Fed. 769; *Gunning v. Sorg* (1905), 214 Ill. 616, at 625, 73 N. E. 870; *Porter v. Sabin* (1892), 149 U. S. 473, at 479, 37 L. ed. 815; *Stephens v. Augusta*, etc. (1904), 120 Ga. 1082, 48 S. E. 432; *Reed v. Axtell*, etc. (1887), 84 Va. 231, at 234, 4 S. E. 587.

judgment the law and the evidence in the particular case require.”⁶⁵

The New Jersey Chancery Court in 1875⁶⁶ lays down the law as follows: “Where an injury results from the default or misconduct of a receiver appointed by a court of equity, while acting under color of the authority of the court, there being no dispute as to the power of the court to make the order under which he claims to have acted, the court may, in its discretion, either take cognizance of the question of the receiver’s liability and determine it, or permit the aggrieved party to sue at law. But if the power of the court is disputed, the court then has no choice; it must assume exclusive jurisdiction, and inhibit the aggrieved person from seeking redress against the receiver in any other tribunal. Any other course when its jurisdiction is assailed, would be an abandonment by the court of both its powers and dignity.”⁶⁷

§ 717. Effect of Suits against Receiver.⁶⁸ Suits against a receiver in England are suits against him personally. If judgment is obtained against him and he is required to respond to such judgment he may be indemnified out of funds in the receiver’s hands. In America suits against a receiver are in effect only against the receivership and against the funds in the hands of the receivership.⁶⁹

§ 718. Process and Appearance in Suits against Receiver.^{69a} Concerning United States Judicial Code, sec. 66, the Supreme Court of the United States says:⁷⁰ “It was intended to place receivers upon the same plane with railroad companies, both as

⁶⁵ Reed v. Axtell, etc. (1887), 84 Va. 231, at 236, 4 S. E. 587, citing Powell v. Manson, 22 Gratt. 177; Lambert v. Cooper, 26 Gratt. 61; Snowffers, Adm., v. Hausbrough, 79 Va. 166; Fishburn v. Ferguson, 84 Va. 87, 4 S. E. 575.

⁶⁶ Klein v. Jewett (1875), 26 N. J. E. 474, at 475.

⁶⁷ Klein v. Jewett (1875), 26 N. J. E. 474, at 475.

⁶⁸ See ch. XXIX, “Liabilities of Receiver.”

⁶⁹ Smith v. Jones Lumber & M. Co. (1912), 200 Fed. 647, at 650.

^{69a} See U. S. Judicial Code, sec. 66, Vol. II, this work, ch. XXXII.

⁷⁰ Eddy v. Lafayette, 163 U. S. 456, at 464, 41 Law Ed. 225, 16 S. C. Rep. —.

respects their liability to be sued for acts done while operating a railroad and as respects the mode of service." Under the New York Civil Code of Procedure regulating the service of process on foreign corporation in the state of New York⁷¹ the Supreme Court of New York has held that service upon agents of the receivers of a foreign corporation was properly set aside on the ground that the papers do not show that the plaintiff could not in the exercise of due diligence have made service on the receiver within the state of New York.⁷²

Service against Receiver of Corporation Same as against Corporation. According to federal decisions⁷³ interpreting federal practice statutes and according to the statutes and rulings of the courts of North Carolina, service on a local agent of the railroad company is service on the receivers.⁷⁴ Most states provide by statute specifically how receivers of railroads may be served.

Those who claim the disposition or possession of property in the hands of receivers of a court must come into that court, in the case in which the receiver was appointed to reach the property, and an independent suit for that purpose can not be maintained even in the same court.⁷⁵

§ 719. Suits against Receiver Concerning Property Which Has Come Into His Possession. When property has come into the possession or custody of a receiver, it frequently happens that third parties make certain claims concerning that property. If they proceed against the property or against the receiver in charge of such property they may be guilty of contempt of the court appointing the receiver of such property. It is not the usage of courts of equity to refuse liberty to

⁷¹ New York Code of Civil Procedure, sec. 432.

⁷² Gursky v. Blair (1916), 218 N. Y. 41; 112 N. E. 431. See contra, Jacobs v. Blair (1913), 157 N. Y. App. Div. 601, 142 N. Y. S. 897. See Venner v. Denver, etc. (1907), 40 Colo. 212, 90 Pac. 629.

⁷³ Eddy v. Lafayette, 49 Fed. Rep. 807. See Trust Co. v. Railroad Co., 40 Fed. Rep. 426.

⁷⁴ Farris v. Railroad Co. (1894), 115 N. C. 600, 20 S. E. 167; Grady v. Railroad Co. (1895), 116 N. C. 952, 21 S. E. 304; State v. Railroad (1909), 152 N. C. 785, at 786, 67 S. E. 42; Hollowell v. Railroad Co. (1910), 153 N. C. 19, at 21, 68 S. E. 894.

⁷⁵ American Loan & T. Co. v. Central Vermont R. Co. (1898), 86 Fed. 390, at 392.

try a right which is claimed against its receiver unless it is perfectly clear that there is not foundation for the claim,⁷⁶ therefore a claimant should make application *pro interesse suo* and ask leave to bring suit concerning such claims or property.

§ 720. Foreclosure Suit against Property in Receiver's Hands. Mortgaged or pledged property is frequently placed in the hands of a receiver by the court at the suit and at the instance of someone other than a mortgagee. In such a case if a mortgagee wants foreclosure, his procedure is to intervene and ask for a foreclosure in the court appointing a receiver⁷⁷ or ask to be allowed to foreclose in another court. If he foreclose in the court appointing the receiver the usual practice is to ask that the receivership be extended to the foreclosure suit. Sometimes the main cause and the foreclosure suit are consolidated into one.⁷⁸

§ 721. Suit against Receiver for Tort of Defendant Corporation. Said the Illinois Appellate Court: "We know of no rule of law which permits one claiming a right of action for a tort against a corporation in the hands of a receiver to sue for and recover against the receiver, either at law or in equity, the damages so suffered by him."⁷⁹

The act of congress⁸⁰ permitting receivers appointed by any federal court to be sued without permission of such court limits such suit to any act or transaction of the receivers "in carrying on the business connected with such property." It does not apply to a cause of action to a plaintiff prior to the appointment of the receivers and hence not connected with their management of the business connected with the property committed to their care and control.⁸¹

⁷⁶ *Randfield v. Randfield* (1861), 3 De G., F. & J.; *Lane v. Capsey* (1891), 11 Ch. D. 414.

⁷⁷ *Chicago & A. R. Co. v. U. S. & M. T. Co.* (1915), 225 Fed. 940, at 942.

⁷⁸ *Chicago & A. R. Co. v. U. S. & M. T. Co.* (1915), 225 Fed. 940, at 942.

⁷⁹ *Healy v. Defiance City Bank* (1911), 160 Ill. App. 625, at 626.

⁸⁰ United States Judicial Code (1911), sec. 66. See Vol. II, ch XXXII, *infra*.

⁸¹ *Allen v. Railroad* (1914), 184 Mo. App. 492, at 494, 170 S. W. 455; *Smith v. Railroad*, 151 Mo. 391, at 402; 52 S. W. 378; *Harmon*

Without statute receivers may be sued only by leave of the court appointing them. Receivers may be sued by the statutes of most states⁸² and by federal statutes.⁸³ The Illinois Statute Act of March 3, 1887, declares that, "every receiver may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which said receiver or manager was appointed." Both the Illinois Supreme Court and the United States Supreme Court held that it was not intended by the word "his" to limit the right to sue to cases where the cause of action arose from the conduct of the receiver himself or his agents, but that with respect to the question of liability he stands in place of the corporation.⁸⁴

Suit against Receiver for Tort of Defendant in Name of Defendant and Receiver. Under the provisions of North Carolina statutes⁸⁵ and under court rulings, receivers are properly named as defendants to an action instituted upon a cause of action arising prior to their appointment because the action against the receiver was in effect an action against the insolvent corporation.⁸⁶ Accordingly in North Carolina it was held that it is proper to sue the receivers alone or to join as defendants the corporation and the receivers, though the cause of action arose prior to the appointment of the receivers.⁸⁷

When a receiver is in actual possession of the property of a manufacturing or railroad company and being engaged in the operating of the same to the entire exclusion of the

v. Perkins, 88 N. E. 961, Ind. App. —; Northern Pac. Ry. Co. v. Hoffman, 83 Fed. 93.

⁸² Illinois Statutes, Act of March 3, 1887, 301; cited in McNulta v. Lochridge (1891), 141 U. S. 327, at 331, 35 L. ed. 796, 12 S. C. Rep. 11. Ohio Stats., Gen. Code, sec. 11896.

⁸³ Federal Stats., U. S. Judicial Code (1911), sec. 66. See ch. XXXV, Vol. II, infra.

⁸⁴ McNulta v. Lochridge (1891), 141 U. S. 327, at 331, 35 L. ed.

796; International, etc., Ry. v. Ormond (1907), 121 S. W. 809, Texas Civ. App.; Railway v. Hurley, 10 Tex. Civ. App. 246, 31 S. W. 73.

⁸⁵ North Carolina R. S., sec. 1224.

⁸⁶ Hollowell v. Railway Co. (1910), 153 N. C. 19, at 21, 68 S. E. 894, quoting Kissinger v. Fitzgerald, 152 N. C. 247, 67 S. E. 588.

⁸⁷ Hollowell v. Railway Co. (1910), 153 N. C. 19, at 21, 68 S. E. 894.

company, such receiver is a necessary party to an action against the company to compel it to accept a certain fare in exchange for carriage. It being physically impossible for the company to obey the judgment, the receiver must be joined.⁸⁸

§ 722. Suits against Receiver for Contracts of Defendant. For the effect of receivership on contracts of the defendant, see ch. XXI.

§ 723. Receiver Can Only Make Defense of Defendant. If a debt due a company for a sale made by the company before the appointment of a receiver, then the receiver collects such chose in action subject to all the equities by way of setoff or otherwise which exist between the company and the debtor.⁸⁹ He can not make any defense against to an action on a chattel mortgage which the debtor could not have made before the property went into the hands of the receiver.⁹⁰ See sec. 742 this chapter, "Suits by Receiver to Avoid Acts of Defendant Corporation."

§ 724. Suit against Receivers and Others Jointly. Said the Supreme Court of Illinois in 1908, in the matter of receivers being joined as joint tort feorsors as follows: "The receivers of the Chicago Union Traction Company, when sued for a wrongful act committed by them and other persons jointly, have both the joint and several liabilities resting upon them, and the person who has been injured by the wrongful act of the receivers jointly with other wrongdoers can not be deprived of his right to treat all wrongdoers who have injured him as jointly liable and of joining them in one suit by the circumstances that the law provides a different mode of obtaining satisfaction against different tort feorsors."⁹¹

⁸⁸ Porter v. Sabin (1898), 149 U. S. 473, at 478, 37 L. ed. 815.

⁸⁹ Rochester Tumbler Works v. M. Woodbury Co. (1913), 215 Mass. 194, at 198, 102 N. E. 438.

⁹⁰ Albien v. Smith (1909), 123 N. W. 675, at 680, and cases cited, 24 S. D. 203.

⁹¹ Tandrup v. Sampsell (1908), 234 Ill. 526, at 533, 85 N. E. 331.

SUITS BY RECEIVER

§ 725. Federal Statutes Permitting Suits by Receivers.

For an outline of federal statutes on the subject of receivers, see U. S. Judicial Code, ch. XXXV, Vol. II, *infra*.

§ 726. State Statutes Permitting Suits by Receiver. For an outline of state statutes on the subject of receivers, see ch. XXXV, Vol. II, *infra*.

§ 727. Leave of Court Necessary for Receiver to Sue. When a court exercising jurisdiction in equity appoints a receiver of the property of an individual or a corporation the court assumes the administration of that property and if the court appoints a receiver of all the property of a corporation, it assumes the administration of the estate of the corporation.⁹² It is for the court appointing the receiver in its discretion to decide whether it will determine for itself all claims of or against the receiver or will allow them to be litigated elsewhere.⁹³

Furthermore the appointing court must say whether or not the receiver will bring suit or adjust claims without suit as in the judgment of the court may be most beneficial to those in the estate.⁹⁴

§ 728. Authorization to Receiver to Sue By Order of Appointment. When an original order appointing a receiver confers on the receiver authority "to prosecute and maintain any suits at law or in equity for the recovery, preservation or protection of the property," no further special decree of court is necessary to enable the receiver to bring, for instance a replevin suit.⁹⁵

§ 729. Effect of Granting Receiver Leave to Sue. If a receiver is authorized by the court appointing him to bring

⁹² Porter v. Sabin (1892), 149 U. S. 473, at 479, 37 L. ed. 815, 13 S. C. Rep. 1008.

⁹³ Porter v. Sabin (1892), 149 U. S. 473, at 479, 37 L. ed. 815, 13 S. C. Rep. 1008.

⁹⁴ Porter v. Sabin (1892), 149 U. S. 473, at 477, 37 L. ed. 815, 13 S. C. Rep. 1008.

⁹⁵ Littlefield v. Railroad Co. (1908), 104 Me. 126-134, 71 Atl. 657.

suit at law or in equity in an *ex parte* hearing, such authorization can not be treated as a final determination in advance by the appointing court of the jurisdiction or validity or propriety or legality of any particular proceeding whether at law or in equity that might be instituted in consequence of that authority.⁹⁶

§ 730. Receiver Not Forced to Sue without Indemnity. An equitable non-statutory receiver appointed in pursuance of the court's equitable powers to hold the assets of a corporation and dispose of them as the court shall direct, may refuse to sue to set aside a conveyance by a partner until he is indemnified for costs and expenses in such a suit where the cause of action is the sole assets of the partnership in the hands of the receiver.⁹⁷

§ 731. Receivers Can Not Sue Parties to the Main Suit. Receivers are merely the hand of the court to hold and manage the property placed in their hands by the court. They can not enter into litigation between the parties to the main suit touching the property in their hands to be held until the same is distributed by order of the court. A receiver should have authority express or implied from the court for all his acts. To engage in, sue and defend a cause at law or in equity they should obtain permission from the court appointing them. It is anomalous for a receiver to except to the decision of a master in chancery, the alter ego of the court for the investigation of questions involved in litigation referred to such master.⁹⁸

§ 732. Suits by Receiver Ancillary to Main Suit. The jurisdiction of the court appointing a receiver to entertain a petition of the receiver against a third party depends upon its jurisdiction in the original suit in which the receiver was

⁹⁶ *Jones v. Moore* (1912), 198 Fed. 301, at 303. See notes in 26 C. C. A. 49.

⁹⁷ *Flinn v. Hanbury* (1913), 141 N. Y. S. 844.

⁹⁸ *Metropolitan Trust Co. v. North Carolina Lumber Co.* (1908), 162 Fed. 170, at 179.

appointed to which the proceeding by the receiver against a third party is wholly ancillary.⁹⁹

§ 733. Suits by Receiver in Official Capacity. A receiver must be presumed to have the power to take all such steps as are essential to enforce the performance of contracts or agreements made with him in the course of his receivership. It can not be that one who is appointed a receiver to collect rents has no implied authority to compel payment from one to whom he has leased the premises under the order of the court, or to recover possession of the leasehold in case his tenant holding under a lease made with him refuses to surrender.¹

It is a receiver's duty to receive and get in the estate. He gives security for the due discharge of his duty. He is bound to get in all that can be recovered, and such debts are due him in his character as receiver,² nevertheless, it is proper for the receiver to get an order of court to bring suit in such a case.

Receivers where they see the necessity need not apply to the court appointing them for leave to distrain for rent, unless there is some doubt who has the legal title for that receiver must distrain in the name of the person who has that right.³

Attornment by the tenant seems to give the receiver a right to distrain in his own name. If the tenant refuses to attorn it is necessary to compel him to attorn. If there is an attornment, you have a privity and the receiver can distrain in his own name, not otherwise.

In the case of a receiver of a partnership, it has been held that all the rights of the firm at once passed to the receiver in trust for the partners and their creditors including of course authority to bring suit on certain old claims.⁴

⁹⁹ Peck v. Elliott (1897), 79 Fed. 10, at 11, 24 C. C. A. 425, at 427.

¹ Pouder v. Catterson (1890), 127 Ind. 435, 26 N. E. 66; 2 Daniel Ch. Pr., 1748; Kehr v. Hall (1888), 117 Ind. 405, 20 N. E. 279.

² Ex parte Harris (1876), 2 Ch. Div. 423.

³ Lord Hardwick, in Pill v. Snowden (1752), 3 Atk. 750; Bennet v. Robins (1832), 5 C. & P. 379.

⁴ Rand, Receiver, v. Wright (1894), 141 Ind. 226, at 234, 39 N. E. 447.

Causes of action for injuries to rights in property survive to personal representatives and pass to a receiver in supplemental proceedings.⁵

§ 734. Claims by Receiver Where Litigated. Said the Supreme Court of the United States: ⁶ "It is for that court (the appointing court) in its discretion to decide whether it will determine for itself all claims of or against the receiver or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in another tribunal, or may leave him to adjust and settle them without suit as in its judgment may be most beneficial to those interested in the estate."

The Supreme Court of Kansas has passed on the question of the venue of suit brought by a receiver,⁷ and holds that when receivers claim certain real property as belonging to the estate in the receivers' hands, a suit to recover such property should be brought in the county where the land is situated.

Where receivers hold a mortgage on real estate and they bring suit to foreclose, such foreclosure suit should be brought in the county where the land is located. Where a receiver sues to recover on a promissory note, he should sue where the statute covering venue in ordinary actions prescribes that the suit be brought.

The Supreme Court of Kansas holds further that rules of equity should not, and the court is constrained to hold that they do not, interfere with the rules enacted by the legislature for the protection of those against whom legal proceedings may be instituted.⁸

§ 735. Summary and Plenary Suits by Receiver. A court of equity, which in the due exercise of jurisdiction, had appointed receivers of the assets and property of a corporation and enjoined interference by others with such property, has

⁵ *Bennett v. Quinn* (1894), 80 Hun 390.

⁶ *Porter v. Sabin* (1892), 149 U. S. 473, at 479, 37 L. ed. 815.

⁷ *The State, ex rel., v. Flannelly* (1915), 96 Kan. 372, at 380, 152 Pac. 22.

⁸ *The State, ex rel., v. Flannelly* (1915), 96 Kan. 372, at 380, 152 Pac. 22.

powers, by summary process after due notice and opportunity to be heard, to compel a repayment by one who with knowledge of the order of injunction and in notation of its terms, took in satisfaction of an indebtedness from a debtor to the corporation property forming part of the assets of such corporation.⁹ Yet a summary rule to show cause should not be substituted for an action at law by a receiver where there is no injunction order, and where the debt is due the corporation at the time of appointment of receiver.¹⁰

Summary Action by Court against One Not a Party. A tenant having entered into an agreement with the court itself, by means of the receiver, it is not necessary to file a bill or plenary suit against the tenant.¹¹

Injunction may be had upon motion to restrain a purchaser not a party to the cause who has not paid his purchase money from committing waste on the property purchased, because by his act of purchase he submits himself to the jurisdiction of the court as to all matters connected with that character.¹²

However, where a bank which is not a party to the suit refuses to pay or deliver over to the receiver assets belonging to the defendant, and such bank being in a different county has never been within the jurisdiction of the court, a summary order can not be issued against it for failure to hand over the assets. The proper procedure is for the appointing court to order its receiver to demand payment, and upon failure of the bank to pay, to forthwith institute suits to recover the amounts of the deposits.¹³

§ 736. Suits by Receiver at Law and in Equity. When a federal court acquires jurisdiction of a controversy by

⁹ *Bien v. Robinson* (1907), 208 U. S. 403, at 428, 52 L. ed. 556. See *In re Sacker* (1888), 22 Q. B. D. 179, at 185.

¹⁰ *Price v. Horrigan Contracting Co.* (1915), (Del. Ch.), 95 Atl. 345.

¹¹ *Attorney General v. Duke of*

Lancaster (1737), 1 Dickens' 68; *Walton v. Johnson* (1848), 15 Sim. 352.

¹² *Casamajor v. Stroude* (1823), 1 S. & S. 381.

¹³ *Tenth Nat. Bk. v. Construction Co.* (1910), 227 Pa. 354, 76 Atl. 67.

proceedings at law or in equity, it acquires jurisdiction of the controversy for the purposes of further proceedings both at law and in equity.¹⁴ The complete jurisdiction of the court over the res, the property and assets of the defendant, involves the federal court's right to bring before it persons having possession of any of those assets or having claims thereon or who are indebted to it, and either itself hear and determine all controversies or refer them to a master or to a jury as it sees fit.¹⁵

A court of equity is not deprived of jurisdiction simply because a purely legal question becomes collaterally involved. In such a case the court of equity in its discretion may submit such controversy upon issues made up to a jury, or dispose of them without doing so.¹⁶

The above statement holds true in strictly chancery courts, in the federal mixed practice of equity and chancery and in code state courts.

§ 737. Choses in Action Passing to Receiver. Ordinarily choses in action belonging to the defendant individual or corporation pass to the receiver when such receiver takes possession of the business and all the assets of such defendant.¹⁷ Such receiver acquires no greater rights under such chose in action than the corporation defendant itself possessed. and any chose in action which passes to the receiver is enforceable by him only as it could have been enforced by the corporation at the time of the appointment. Such chose in action is subject to any setoff which existed at the time of the appointment of the receiver.¹⁸

§ 738. Trover or Conversion Suits Brought by Receiver. The Supreme Court of Texas held that a receiver of an

¹⁴ Whelan v. Enterprise Transp. Co. (1908), 164 Fed. 95, at 97, citing White v. Ewing, 159 U. S. 36, 40 L. ed. 67; Krippendorf v. Hyde, 110 U. S. 276, at 287, 28 L. ed. 145.

¹⁵ Peck v. Elliott (1897), 79 Fed. 10 and 12.

¹⁶ Peck v. Elliott (1897), 79 Fed. 10, at 12.

¹⁷ Peck v. Elliott (1897), 79 Fed. 10, at 11, 24 C. C. A. 425.

¹⁸ Knebler v. Haines (1910), 229 Pa. St. 274, 278, 78 Atl. 141. See sec. 743. *infra*.

oil company got the legal title to certain tank cars. Having such legal title, when a third party took possession of them, the receiver could sue such third party for conversion.¹⁹

§ 739. Suits by Receiver to Collect Assets. For the purpose of collecting choses in action and other assets of the defendant, the court appointing the receiver may direct him to institute independent suits in the appointing court or in other courts, or cause such debtors, if within the jurisdiction of the appointing court, to be made defendants in the principal cause or main cause and determine for itself any question which might be involved by the defenses to the claims.²⁰ The receiver takes his title or authority to collect such choses in action by operation of law.²¹

When a federal court appoints a receiver of an insolvent corporation the receiver does not stand in the shoes of the company, and it can not be said he has no higher rights than the company itself. The receiver is the representative of the court. The court proceeds upon its own authority to collect the assets of the estate with the administration of which it is charged. If the receiver appears as a party to a suit to collect such assets it is only because he represents the court in its inherent power to wind up the estate of an insolvent corporation over which it has, by an original bill, obtained jurisdiction.²²

§ 740. Suits by Receiver to Collect Unpaid Stocks. For the purpose of collecting in choses in action, the court appointing the receiver may direct its receiver to institute independent suits in the court appointing the receiver or in other courts, or cause such debtors to be made defendants in the main case and determine for itself any question which might be involved by the defenses of the claim.

¹⁹ *Smith v. Texas & N. O. R. Co.* (1908), 108 S. W. 819, 101 Tex. 405.

²⁰ *Peck v. Elliott* (1897), 79 Fed. 10, at 12; *Porter v. Sabin*, 149 U. S. 479, 37 L. ed. 815, 13 Sup. Ct. 1010; *Bowman v. Harris* (1899), 95 Fed. 917, at 918.

²¹ *White v. Ewing* (1894), 159 U. S. 36, at 40, 40 L. ed. 67, 15 S. C. Rep. 1018.

²² *White v. Ewing* (1895), 159 U. S. 36, at 40, 40 L. ed. 67, 15 S. C. Rep. 1018; *Bowman v. Harris* (1899), 95 Fed. 917, at 918. See sec. 743, *infra*.

Complete jurisdiction of the court over the res, the property and assets of a corporation, involves the court's right to bring before it persons having possession of any of those assets, or having claims thereon or who were indebted to it, and such appointing court may either itself hear and determine all controversies or refer them to a master or to a jury as it may see fit.

A court of equity is not deprived of jurisdiction simply because a purely legal question becomes collaterally involved. It might at its discretion submit such controversy upon issues made to a jury or dispose of it without doing so. A liability to a corporation for unpaid stock passes to the receiver. It may be of a legal character, but that does not defeat the jurisdiction of the court of equity appointing the receiver to entertain such a petition of its receiver against a stockholder to collect unpaid stock.²³ It must be noted that a stockholder's double liability does not run directly to the corporation, therefore, except by statute, it does not run to the equitable receiver or corporation.²⁴

§ 741. Suits by Receiver Concerning Property in His Possession. "If property has come into the possession or custody of the receiver and he is ordered to care for such property, he may have inherent power to sue for that property, as for instance against one who wrongfully invaded such possession and converted the goods committed to his care. In that case if the receiver were not allowed to sue, he could not rise to the dignity and power of the ordinary bailee."²⁵

A receiver may bring an action in his own name if he is the holder of a bill of exchange,²⁶ or if he as receiver has obtained an assignment of the judgment debt he is a creditor entitled to present a bankrupt petition.²⁷

²³ Peck v. Elliott (1897), 79 Fed. 10, at 12.

²⁴ See ch. XVI, "Receivers in Stockholder's Liability Suits."

²⁵ Singerly v. Fox (1874), 75 Pa. St. 112.

²⁶ In re Sacker (1888), 22 Q. B. D. 185; Ex parte Harris (1876), 2 Ch. D. 423.

²⁷ In re Macon (1904), 11 K. B. D. 702.

§ 742. Suits by Receiver to Avoid Acts of Defendant Corporation. It has been held under the New York statutes²⁸ and substantially the same under the New Jersey statutes,²⁹ that a receiver of a corporation appointed under the statutes represents the creditors and the stockholders, but for all purposes of inquiry into his title he represents the corporation. Said Comstock, J.: "So far as shareholders are concerned, he can litigate respecting the fund upon precisely the grounds which would be available to the corporation if it were still in existence, solvent and no receivership had been constituted."

In regard to creditors I should certainly incline to take the same view of his rights and powers under the statutes referred to. It has, however, been uniformly assumed, and was not denied on the argument, that he succeeds to the rights of creditors and takes title under them where conveyances have been made in fraud of their rights, but otherwise valid. In such cases he holds adversely to the debtor corporation."³⁰

§ 743. In Whose Name Suit by Receiver Is Brought. When a receiver sues for a debt or on a chose in action which belonged to the defendant at the time the receiver was appointed, or under a contract made with the defendant before the receiver was appointed, the suit should be in the name of the defendant by John Smith, its, his or her receiver.³¹

"Money due for a sale by the company before the receivership and money due for a sale by the receiver are quite different in character. In the case of a debt due the company for a sale made by it, the receiver collects a chose in action of the company. The chose in action is due under a contract made by the company subject to all the equities, by way of

²⁸ Curtis v. Leavitt (1857), 15 N. Y. 3, at 44.

²⁹ Werner v. Murphy (1894), 60 Fed. 769, at 770.

³⁰ Curtis v. Leavitt (1857), 15 N. Y. 3, at 44.

³¹ Rochester Tumbler Works v. M. Woodbury Co. (1913), 215 Mass 194, at 199, 102 N. E. 438; Davis v. Gray (1872), 16 Wall. 203, at 217, 21 L. ed. 447.

setoff or otherwise, which exists between the company and the debtor.^{31a} In case of a company debt the receiver sues in the name of the company which was party to the contract, unless the chose in action has been assigned to him and he is allowed by the law of the forum to bring an action as assignee in his own name. But in case of a debt due for a sale made by a receiver, the receiver is the party to the contract of sale. The action for that reason must be brought in his own name and is not subject to any equities by way of setoff or otherwise which could be set up by the company.”³²

Suit by Receiver of Lessor in Name of Lessor. An equity receiver of a lessor is not an assignee of the lessor's interest in the lease, therefore an action to recover the premises must be had in the name of the original owner or lessor.³³ If there is no other objection to a bill filed in the name of the receiver which ought to have been in the name of the corporation defendant, it may be amended by substituting the name of the defendant.³⁴

§ 744. Setoffs and Counterclaims against Receiver's Claims. Receivers, when they operate a business or property, do it as independent operators, not as mere successors of the company whose property they take into their possession.³⁵ Where a receiver finds a contract partly performed by the company and proceeds to work under the contract to determine whether or not it is beneficial to the estate, he is entitled to recover on a quantum meruit for the work done before abandoning the contract. In such a case damages for the company's failure to complete the contract can not be set off against the receiver's claims on a quantum meruit for work done.³⁶

^{31a} See *Hollander v. Heaslip* (1915), 222 Fed. 808, at 812.

³² *Rochester Tumbler Works v. M. Woodbury Co.* (1913), 215 Mass. 194, at 198, 102 N. E. 438.

³³ *Noble v. Brooks* (1916), 112 N. E. 649, 224 Mass. 288. See *Wilson v. Welch* (1892), 157 Mass. 80, 31 N. E. 712.

³⁴ *Wilson v. Welch* (1892), 157 Mass. 80, 31 N. E. 712.

³⁵ *Barber Asphalt Co. v. Forty-Second St. M. & St. N. Ave. Ry. Co.* (1909), 175 Fed. 154, at 155.

³⁶ *Butterworth v. Degnon Const. Co.* (1914), 214 Fed. 772. See ch. XXVII.

CHAPTER XXVII

INTERVENTION AND PRESENTATION OF CLAIMS

ANALYSIS

INTERVENTION

- § 745. Intervention—Generally.
- § 746. Unsecured Creditors No Right to Intervene.
- § 747. Effect of Refusal to Allow Intervention.
- § 748. Right of Intervenor to Appeal from Refusal to Allow Intervention.
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- § 750. Intervention by Mortgagee.
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- § 752. Intervention by Holder of Factor's Lien.
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- § 754. Intervention by Employees of Receiver.

PRESENTATION OF CLAIMS

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- § 765. Claims by Landlord against Tenant in Receivership.
- § 766. Claimants Issuing Execution during Receivership.
- § 767. Creditor Pursuing Suit to Judgment during Receivership.
- § 768. Creditor Suing and Getting Judgment after Appointment of Receiver.

INTERVENTION

§ 745. **Intervention—Generally.** An intervenor is one who comes into the litigation asserting a right antagonistic or superior to that of one or both of the parties thereto.¹ Inter-

¹ *Bosworth v. Terminal Ry. Assn* (1898), 174 U. S. 187 43 L. ed. 941, 19 S. C. Rep. 625.

vention implies the making of a new and independent party to the litigation with an independent attorney, and in many cases an independent counsel.²

"There is no such thing known to equity practice as the admission of a stranger as a party to a pending suit, either as complainant or defendant, unless the complainant shall consent thereto, or there be a statute within the provisions of which he may bring his application."³ The purpose of this rule is to maintain the integrity of the issues raised by the original pleadings, and if new parties are admitted to keep the issues within the scope of the original suit.⁴

Said the Supreme Court of Minnesota in the case of *State, ex rel. Pope, v. Germania Bank of St. Paul*, 103 Minn. 129, at 143: "It is elementary that the court appointing a receiver or assignee in insolvency proceedings has and retains exclusive jurisdiction over the proceedings and the receiver or assignee for all purposes, setting and adjusting in the same proceeding all conflicting interests, all controversies, and all matters arising out of or connected with the trust, all questions respecting the accounts of the receiver, allowances for his compensation, the compensation of his attorneys, agents and necessary clerks."⁵

Until the receiver is discharged he is accountable to the court appointing him not only for his authorized acts but for whatever he has done in the name of the court and under color of his office, although outside the scope of his authority.⁶

After a court has taken possession of property through a receiver, any attempt to proceed against that property even by a lienholder without the court's consent would be contempt of that court.⁷

² *Sands v. Greeley* (1897), 80 Fed. 195.

³ *Shephard v. New Jersey C. W. & L. Co.* (1907), 74 Atl. 140, 73 N. J. E. 578, citing 1 Dan. Ch. Pr., 287, note 2.

⁴ 1 Dan. Ch. Pr., 287, note 2.

⁵ Cited with approval in *Haines v.*

Buckeye Wheel Co. (1915), 224 Fed. 297; see *Spencer v. Babylon R. Co.* (1916), 233 Fed. 803, at 804.

⁶ *Haines v. Buckeye Wheel Co.* (1915), 224 Fed. 289, at 297.

⁷ *Randall v. Wagner Glass Co.* (1911), 94 N. E. 739, 47 Ind. App. 439.

One who claims to be the owner of property taken from him by a receiver, or one who has an equitable or legal claim against such property, should file his petition *pro interesse suo* in the case in which the receiver was appointed, assert his claim to such property and have that court adjudicate the matter.⁸ Every legal and equitable lien upon the property of a corporation is preserved with the power of enforcing it.⁹

§ 746. Unsecured Creditors No Right to Intervene. The unsecured creditors are as a rule total strangers to the record. A total stranger to the record will not be permitted to come in with a demand that may require a hearing on issues outside of those made between the original parties.¹⁰ The court, however, at any stage of the proceeding, may insist upon new parties when there is a want of parties.¹¹ It therefore follows that even in a receivership the court will not admit as parties claimants who are strangers to the issues made by the original parties. Unsecured claimants against the estate, therefore, as a rule have no right to be made parties.

However, when there are mortgagees or other lienholders who claim the property in the hands of the court, what are they to do? They can not take possession from the mortgagor, for the action of the court has disabled them from doing that. They can not sue the receiver for possession, for the court would not permit that. If they are not parties they must come in by intervention, or if parties, they must petition the court that there be paid to them by the receiver what they claim under their mortgage lien.¹²

⁸ *Strain v. Palmer* (1908), 159 Fed. 628, at 631; *Wiswall v. Sampson*, 14 How. 53, at 65, 14 L. ed. 322; *Krippendorf v. Hyde, et al.*, 110 U. S. 276, 28 L. ed. 145; *Wheeler v. Walton & Wharm Co.*, 64 Fed. 664; *Howell v. Ripley*, 10 Paige (N. Y.) 45; *De Forrest v. Coffee* (1908), 154 Cal. 444, 98 Pac. 27, at 32.

⁹ *Randall v. Wagner Glass Co.* (1911), 94 N. E. 739, 47 Ind. App. 439.

¹⁰ *Shephard v. New Jersey Con. W. & L. Co.* (1907), 74 Atl. 140, at 143, 73 N. J. E. 578.

¹¹ *Shephard v. New Jersey Con. W. & L. Co.* (1907), 74 Atl. 140, at 143, 73 N. J. E. 578.

¹² *Seibert v. Minneapolis, etc., Ry.* (1893), 52 Minn. 246, at 254, 53 N. W. 1151; *Atlantic T. Co. v. Dana* (1903), 128 Fed. 209, at 218.

Many civil codes provide specifically for the bringing in of new parties to an action.¹³

§ 747. Effect of Refusal to Allow Intervention. "When leave to intervene in an equity suit is asked and refused, the rule is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it can not be reviewed, because it merely involves an exercise of the discretionary powers of the trial court.¹⁴ * * * It is doubtless true that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal since it finally disposes of the intervenor's claim by denying him all right to relief."¹⁵

§ 748. Right of Intervenor to Appeal from Refusal to Allow Intervention. Said the Supreme Court of the United States:¹⁶ "When such an action is taken, that is to say, when

¹³ Civil Code of Iowa, sec. 3466; cited in *Hanlon v. Smith* (1909), 175 Fed. 192, at 199.

¹⁴ *Credits Commutation Co. v. Ames' Executor*, 62 U. S. App. 728, at 732; approved, *Credits Commutation Co. v. United States*, 177 U. S. 311, at 315, 44 L. ed. 782; *In re Metropolitan Ry. Receiver* (1907), 208 U. S. 91, at 111, 52 L. ed. 403.

¹⁵ *Credits Commutation Co. v. Ames' Executor*, 62 U. S. App. 728, at 732; approved, *Credits Commutation Co. v. United States* (1899), 177 U. S. 311, at 315, 44 L. ed. 782; *Minot v. Mastin*, 95 Fed. 734, at 739; *United States v. Phillip* (1901), 107 Fed. 824.

¹⁶ *Credits Commutation Co. v. United States* (1899), 177 U. S.

leave to intervene in an equity case is asked and refused, the rule, so far as we are aware, is well settled that the order thus made denying leave to intervene is not regarded as final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding.

“Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it can not be reviewed because it merely involves an exercise of the discretionary powers of the trial court.¹⁷ * * * It is doubtless true that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal since it finally disposes of the intervenor’s claim by denying him all right to relief.”¹⁸

When the record is removed to the appellate court it can then be determined by that tribunal whether the action of the lower court was purely discretionary and its judgment not final, or whether the intervenor was entitled to assert his right by intervention; therefore the correct practice for the chancellor after refusing leave to intervene, is to grant an appeal as a matter of course, if the intervenor prays for an appeal. Such a course of procedure on the part of the chan-

311, at 315, 44 L. ed. 782, 20 S. C. Rep. 636; adopting and quoting *In re Street, Petitioner*, 8 U. S. App. 645, at 650.
from *Credits Commutation Co. v. United States*, 62 U. S. App. 728, at 733.

¹⁷ Citing *Ex parte Cutting*, 94 U. S. 14, 24 L. ed. 49; *Hamlin v. Continental T. Co.*, 47 U. S. App. 422, at 428, 429; *Jones & L., Ltd., v. Sands*, 51 U. S. App. 153, at 157;

¹⁸ *Credits Commutation Co. v. United States* (1899), 177 U. S. 311, at 315, 44 L. ed. 782, 20 S. C. Rep. 636. See, same doctrine, *United States v. Phillip* (1901), 107 Fed. 824; *Minot v. Mastin* (1899), 95 Fed. 734, at 739.

cellor would seem to be necessary, because if a mistake is made by the lower court as to the character of the intervention and the chancellor refuses an appeal, the intervenor is entirely without a remedy.¹⁹

§ 749. Laches of Intervenor. "An intervenor must be diligent and any unreasonable delay after knowledge of the suit will justify the court in disallowing such intervention where no satisfactory excuse is shown for the delay."²⁰ What is laches may be determined from the rules of court²¹ and from the circumstances of the case.

§ 750. Intervention by Mortgagee. One of the most frequent cases of intervention is on behalf of a mortgagee.²² It frequently happens that property is placed in the hands of a receiver before a mortgagee's claim is due or before he has seen fit to bring a foreclosure suit. In this event the mortgagee has an equitable interest in the property which is in the hands of the court. His method of procedure is to intervene, ask permission to file a separate foreclosure suit or ask that the property be sold by the receiver and his claim paid out of the proceeds.²³

A receivership from its very nature is an invitation to all who have claims against or an interest in the property to assert such claims or interest. When property is sold by the court appointing the receiver, and a lienholder ratifies the sale and the proceeds of the sale are in the hands of an officer of the court, the lienholder's remedy is against the fund.²⁴

¹⁹ *United States v. Phillip, J.* (1901), 107 Fed. 824.

²⁰ *Pottlitzer v. Citizens T. Co.* (1915), 108 N. E. 36, at 42, 60 Ind. App. 45; *Halsted v. Forrest Hill Co.* (1901), 109 Fed. 820.

²¹ *Halsted v. Forrest Hill Co.* (1901), 109 Fed. 820, at 824.

²² *Chicago v. U. S. & M. T. Co.* (1915), 225 Fed. 940, at 942, and cases cited. See ch. IX, "Receivers in Mortgage and Lien Cases."

²³ *Forest Lake Cemetery v. Baker* (1910), 113 Md. 529, 77 Atl. 853;

Gaither v. Stockbridge, 67 Md. 222, 9 Atl. 632, 10 Atl. 309; *Brady v. Johnson*, 75 Md. 445, 26 Atl. 49; *Baker v. Hill*, 100 Md. 130, 59 Atl. 275; *Walling v. Miller*, 108 N. Y. 173, 15 N. E. 65; *Wiswall v. Sampson*, 14 How. 52, 14 L. ed. 322.

²⁴ *Pickering v. Richardson* (1910), 106 Pac. 614, 57 Wash. 117; see *Atlantic Trust Co. v. Dana* (1903), 128 Fed. 209, at 218; *Seibert v. Minnesota, etc., Ry.* (1893), 52 Minn. 246, 53 N. W. 1134, 1151.

§ 751. Intervention by Mortgagor. The mortgagor is, with very few exceptions, the party in possession of the property mortgaged. When a receiver is appointed over such property the mortgagor is made party defendant in the suit in which the receiver is appointed and the property is taken out of the possession of the mortgagor and placed in the possession of the receiver. The mortgagor, being a party to such a suit may assert his rights and have them therein adjudicated; he therefore has no cause to intervene.^{24a}

§ 752. Intervention by Holder of Factor's Lien. The Supreme Court of South Carolina has held that goods consigned by a manufacturer to its selling agent but kept in its warehouse subject to the order of the agent is constructively delivered, and the agent has a factor's lien on the goods for money advanced by him on the goods. When a receiver of the business of the manufacturer was appointed, such receiver was entitled to the possession of the goods. Such receiver held them for the benefit of all concerned. The manufacturer could establish his lien by intervening in the receivership suit, but was not allowed to bring a separate suit to recover possession of the goods.²⁵

It has been held by the Georgia Supreme Court as follows: "Where a creditor brought suit in a city court on a note against an insolvent debtor to obtain a common-law judgment against the debtor for principal, interest and attorney's fees, and no equitable relief was sought, it was error, in application of receivers of the debtor, to order that the creditor be made a party to receivership pending in the superior court, and to enjoin the creditor (plaintiff in error) from further prosecution of its suit in the city court."²⁶

^{24a} See *Union Trust Co. v. St. Louis I. M. & S. Ry. Co.* (1916), 234 Fed. 809.

²⁵ *Brown Co. v. Harris* (1909), 88 S. C. 558, 70 S. E. 802.

²⁶ *American National Bank v. Robinson, et al., Receivers* (1913), 141 Ga. 78, 80 S. E. 555, citing *Citizens Bank v. Hubbard*, 70 Ga. 411; *Bradford v. Cooledge*, 103 Ga. 573, 30 S. E. 579.

§ 753. Intervention by State or County to Enforce Tax Claim. Says Peckham, J.:²⁷ "The railroad, when in the receiver's hands and operated by him, is operated under and by virtue of the franchise which has been conferred upon the corporation by the state," and when he receives the gross earnings arising from its operation and has in his hands money enough to pay these taxes, the state has a paramount right to collect them before the moneys applicable to such payment shall be paid away by the receiver. Having such paramount right, the court may in its discretion listen to the petition of the state through its attorney general, and direct its officer to make the payment asked for.²⁸

§ 754. Intervention by Employees of Receiver. A court appointing a receiver should be prompt to protect the employees of the receiver from wrong or injustice done them by the receiver. An employee feeling himself aggrieved by the action of the receiver may appeal to the court appointing the receiver by intervention to have his injuries redressed.²⁹

PRESENTATION OF CLAIMS

§ 755. Effect of Receivership on Creditors' Claims. The effect upon the creditor of the taking over by the receiver of the general assets of the debtor is to substitute for the right of action in personam theretofore existing a right to a proportional share of the impounded assets—a right to receive such a part thereof as its total proved demand bears to the total of all demands unaffected by the fact that it holds security for a part or for all of its debt.³⁰ "A receiver is not appointed for the purpose of keeping persons out of their rights."³¹

²⁷ Supreme Court of New York (1888). See note 28.

²⁸ Central Trust Co. v. New York C. & N. R. R. Co. (1888), 110 N. Y. 250, at 257, 18 N. E. 92. See Walters, et al., v. Western & A. R. Co. (Stewart, Intervenor) (1895), 68 Fed. 1002.

²⁹ Farmers Loan & Trust Co. v.

Central R. & Banking Co. of Georgia (1895), 166 Fed. 333.

³⁰ In re E. Bements Sons (1907), 150 Mich. 530, at 534, 114 N. W. 329.

³¹ Lord Romilly in Eyton v. Denbigh (1868), 6 Eq. 14, at 16; cited in Odell v. H. Batterman Co. (1915), 225 Fed. 292, at 297. See

An order appointing a receiver in a railroad foreclosure suit is interlocutory only. No claimant acquires any right to the property or its income by virtue of the order, and the order might be modified by later orders or by provisions of the final decree. No vested rights accrue to unsecured claimants by the appointment.³²

§ 756. Presentation of Claims—Generally. Said the Supreme Court of Maine: "After the receiver has taken possession, any person claiming the property or any interest therein may present his claim to the court. He may be made a party to the suit in order to establish his claim. Or he may petition to have it heard before a master. Or he may, by express permission of the court, bring a suit for the possession, care being taken to protect the receiver. But the receiver will not be ordered to deliver the property to a claimant until his right is established in one of these modes."³³

Every person who has any claim or demand against the estate in the possession of a receiver, or against the receiver for any act or transaction of his in his official capacity, must assert such claim or demand in the court in which such receiver was appointed without regard to the nature of the controversy, the citizenship of the parties, or the sum or value of the matter in dispute.³⁴

§ 757. Unsecured Creditors Presenting Claims to Receiver. A person who is not a party to an action is not entitled to apply by motion for payment of money to him by a receiver appointed in the action even though his claim is made in respect of a debt properly payable out of the funds in the receiver's hands. An administration decree is a decree for

Pennsylvania Steel Co. v. New York City Ry. (1908), 161 Fed. 786.

³² *Atchison, T. & S. F. Ry. v. Osborn* (1906), 148 Fed. 606, and cases cited.

³³ *Merrill v. Noyes* (1863), 56 Me.

458, at 463; cited in *Chalmers v. Littlefield* (1907), 103 Me. 271, at 283, 69 Atl. 100.

³⁴ *Pendleton v. Lutz* (1900), 78 Miss. 322, at 330, 29 So. 164.

the benefit of all persons who are interested in the testator's estate;³⁵ not so an order appointing a receiver.

However, when the court has made an order directing all claims to be filed with the receiver, the receiver himself could ask for confirmation of the claims and ask to be ordered to pay them.

If the receiver refuses to recognize the claim, even then a third party would have no standing in the court appointing the receiver until he had had himself made a party by intervention *pro interesse suo* or otherwise.

It is for the court which has taken the assets of an insolvent into his hands for distribution, and for that court alone, to determine who its creditors are and what is due to them respectively,³⁶ therefore all claims against a company which is in the hands of a receiver must be ultimately submitted to the court in which the receivership proceedings are pending for its approval before any payment upon them from the assets in the hands of the receiver can be ordered.³⁷ Claims are generally submitted first to the receiver or master, and are ultimately submitted to the court in the receiver's or master's report. Action by the court can be invoked in behalf of such claims by taking exceptions to the receiver's or master's report.³⁸

§ 758. Effect of Confirmation of Unsecured Claims. The legal effect of a mere confirmation of a creditor's claim allowed by a receiver is as follows: It is not an adjudication between the claimant and the defendant as plaintiff and defendant in the action, in respect to the allegations of the complaint, but is simply a determination upon motion of the receiver in respect to a creditor's claim filed with the receiver generally in pursuance of an order limiting the time for preservation of

³⁵ *Brocklebank v. East L. Ry. Co.* (1879), 12 Ch. D. 839.

³⁶ *Attorney General v. Supreme Council American Legion of Honor* (1907), 196 Mass. 151, 81 N. E. 966;

Rinn v. Astor Ins. Co. (1874), 59 N. Y. 148.

³⁷ *Barber v. International Co.* (1902), 74 Conn. 665, 51 Atl. 857.

³⁸ *Sands v. E. S. Greeley* (1897), 80 Fed. 195.

claims. The confirmation of the claim settles for the purposes of the receivership proceedings and distribution of assets, the validity of the amount of the claim. It is not a money judgment against the defendant.³⁹

§ 759. Setting Time for Presentation of Claims. In practice an order is made by the court limiting a time within which claims shall be presented and proved in order to facilitate the proceedings and to promote dispatch in the settlement of the estate.⁴⁰ But no creditor thereby obtains a vested right to a certain dividend to the exclusion of others.⁴¹ If a reasonable excuse for delaying to make an earlier claim is shown, the creditor will be admitted at any time before actual distribution, or even after partial payment, if there be a surplus in the hands of the receivers, so as not to interfere with payments already made.⁴²

Without statute a court of equity has no power to make an order absolutely barring creditors from participating in the fund.⁴³ When once distributed, however, after reasonable notice being given to the creditors to present their claims, of course those who did not present their claims were cut off because the money was already distributed.⁴⁴ It was said by Pitney, V. C., who interpreted the New Jersey statute as follows: "In no case is the order limiting creditors made to work an absolute discharge of the debt."⁴⁵ See what Brewer, J., says concerning an order limiting creditors in a case where no statute covered the matter, in *Leadville Coal Co. v. McCreery*.⁴⁶

³⁹ *Barber v. International Co.* (1902), 74 Conn. 660, 51 Atl. 857. See *In re Marx* (1899), 43 Ark. 983.

⁴⁰ See *Ellicott v. Insurance Co.* (1848), 7 Gill (Md.) 307, at 319.

⁴¹ *Grinnell v. Insurance Co.* (1863), 16 N. J. Eq. 284.

⁴² *Lasley v. Hogg* (1805), 11 Ves. 602; *Gillespie v. Alexander* (1826), 3 Russ. 130; *Wilder v. Keeler* (1832), 3 Paige 164; *Pratt v. Pathbrun* (1838), 7 Paige 271; 2 *Smith's Ch. Pr.* 667; *Grinnell v. Insurance Co.* (1863), 16 N. J. Eq. 284; *Patt-*

berg v. Pattberg & Bros. (1897), 55 N. J. Eq. 606, 38 Atl. 205.

⁴³ *Pattberg v. Pattberg Bros.* (1897), 55 N. J. Eq. 606, 38 Atl. 205.

⁴⁴ *In re Marx* (1899), 43 Atl. 983; *Pennsylvania Steel Co. v. New York City Ry. Co.* (1911), 187 Fed. 287. See *Smith v. Jones L. & M. Co.* (1912), 200 Fed. 647, at 651.

⁴⁵ *In re Marx* (1899), 43 Atl. 983. ⁴⁶ *Leadville Coal Co. v. McCreery* (1891), 141 U. S. 478, 35 L. ed. 824, 12 S. C. Rep. 28.

§ 760. Advertising for Creditors and Claimants. Although it may be that the parties to the suit to whom the court shall adjudge the property in the hands of a receiver, and also lienholders, or those who have a charge against the property, are the only ones who have an absolute right to the property, nevertheless, a court of equity will endeavor to do equity and distribute the fund to those entitled, even if they are unsecured creditors and not parties. To do this the court will generally instruct its receiver to advertise for creditors and claimants and fix a time within which claims shall be presented. In addition, the receiver will generally be ordered to mail a copy of the advertisement or notice to all known creditors.

In England the rules of the supreme court of judicature provide specially for such an order as follows: "Where a judgment or order is given or made, whether in court or in chambers, directing an account of debts, claims or liabilities, or an inquiry for heirs, next of kin or other unascertained persons, unless otherwise ordered, all persons who do not come in and prove their claims within the time which may be fixed for that purpose by advertisement shall be excluded from the benefit of the judgment or order." ⁴⁷

§ 761. Conclusiveness of Court Order Barring Claims. A decree entered in a statutory suit for dissolution of a corporation, barring all claims against the corporation which were not presented for allowance pursuant to a previous order of the court of which due notice was given, includes all creditors of the corporation, as well as all persons interested in the res, so far as the court's decree dealt with the assets of the corporation of which the court acquired possession; and this is so whether the creditors were made parties in person or not, or whether or not there was ever any personal service of process upon them, if the substituted service was made in the manner authorized by the statute of the state in which the statutory receiver was ap-

⁴⁷ Rules of Supreme Court of England of 1883, Chambers (Chancery),

Ord. 55, rule 44. See ch. XXXIII, Vol. II, *infra*.

pointed. But the proceeding as far as the assets in the possession of the court being essentially one in rem, the decree of the appointing court could not affect the demands of creditors against the corporation unless their rights were adjudicated after due notice and an opportunity to be heard had been given to them, and this notice could only be effectively given as to nonresidents of the state by personal service of process.⁴⁸

§ 762. Liquidation of Claims Before a Master. When a receiver is appointed over a railway company or other large and active business or public service corporation, special masters are frequently appointed by the appointing court to liquidate claims of alleged creditors. The claims are presented and proved before the special master agreeably to equity practice.⁴⁹ The master makes up a calendar and gives notice to claimants. "He will, of course, follow the decisions of the higher state courts on all questions touching the construction of the state statute under which the claim arises, and in all instances where a claim shall have been adjudicated in a state court before it is taken up for consideration by him, will liquidate in conformity to the decision of the state court except in cases where newly discovered evidence may show that such court was imposed upon.⁵⁰ If no judgment be presented, he will liquidate on such evidence as may be produced before him by claimant and defendant.⁵¹

"The court does not undertake to restrain claimants whose claims were in suit before receivership, or have since been sued upon, from prosecuting such suits to judgment against the defendant; but, except in cases where some lien on the property was acquired before receivership, it is only the claims that have been proved before the special master which will be entitled to share whatever dividend may be distributed when the assets or their proceeds are marshaled." ⁵²

⁴⁸ Metropolitan Rubber Co. v. Place (1906), 147 Fed. 90.

⁴⁹ Pennsylvania Steel Co. v. Street Ry. Co. (1908), 161 Fed. 787.

⁵⁰ Pennsylvania Steel Co. v. Street Ry. Co. (1908), 161 Fed. 785.

⁵¹ Pennsylvania Steel Co. v. Street Ry. Co. (1908), 161 Fed. 787.

⁵² Pennsylvania Steel Co. v. Street Ry. Co. (1908), 161 Fed. 787.

§ 763. Claims by Third Party Claiming Property Held by Receiver. Where a receiver obtains property by artifice and wrongfully, even under a misapprehension of his duties, he is bound to return it to the person rightfully entitled to it. The proper procedure in such a case is for the owner of the property to ask to be allowed to appear in the receivership proceedings *pro interesse suo*, and ask for an order requiring the receiver to return the property or its proceeds.⁵³

§ 764. Claims by Third Party Holding Vendor Lien. Under the Louisiana practice where vendor's liens obtain somewhat different than in other jurisdictions, the supreme court of that state has recently held the holder of a judgment against the defendant with recognition of vendor's lien and privilege upon certain property then in the possession of a receiver of the defendant is entitled to have such property sold by the receiver and the proceeds of the sale, less costs incurred by the sale thereof, distributed immediately. The receiver may be ordered to file forthwith a provisional account.⁵⁴

§ 765. Claims by Landlord against Tenant in Receiver's Hands. A chancery receiver has no better right to retain possession of a leasehold than a trustee in bankruptcy has. The landlord has the same right to enforce a forfeiture of a lease against a receiver in possession as he has against a trustee in bankruptcy in possession.⁵⁵

The landlord's right to a forfeiture of the lease must be worked out either in the action in which the receivers were appointed or in an independent action brought only upon leave of the court by which the appointment was made. And it is for the appointing court to say whether it will try the question or send it elsewhere to be tried. The landlord should apply to the appointing court for the right to intervene.

⁵³ McGill v. Brown (1913), 72 Wash. 514, 130 Pac. 1142.

⁵⁴ Hudson v. Uncle Sam, etc. (1915), 136 La 1071, 68 So. 129.

⁵⁵ O'Dell v. H. Batterman Co. (1915), 223 Fed. 292.

§ 766. Claimants Issuing Execution During Receivership.

When property by the appointment of a receiver is placed in the custody of the law, no other court can seize the property and transfer it by ordering execution and levy or otherwise. Any attempted sale under execution or levy or otherwise by another court is void.⁵⁶ An attachment before receiver appointed may, under certain statutes, confer a lien although it does not bring the property in the custody of the officer.⁵⁷ If such lien is conferred, the holder of the same is entitled to have the lien paid in the final receivership distribution in its proper order.⁵⁸

§ 767. Creditor Pursuing Suit to Judgment During Receivership. After the appointment of a receiver no lien against the property can be acquired by third parties, not parties to the suit in which the receiver was appointed, bringing suit or taking judgment on suit already pending unless such lien obtained when the receiver was appointed.⁵⁹ After jurisdiction of the court over the assets has once attached, ordinarily no creditor can pursue a legal remedy, at least in such a way as to obtain for himself a preference.⁶⁰ This rule applies to the appointment of a receiver of a partnership, even though the partnership is voluntarily placed in the hands of the court for distribution.⁶¹

The reason for this is that a lien is created by contract of the lienor and lienee or by operation of the law. After the appointment of a receiver the lienor can not by contract affect the possession or status of property which the court holds in its possession. Neither can the ordinary statutory law of liens operate on and affect property which is in the custody of a particular

⁵⁶ *Grosscup v. German Savings & Loan Society* (1908), 162 Fed. 947, at 953.

⁵⁷ *In re Hall & Stetson Co.*, 73 Fed. 527.

⁵⁸ *Grosscup v. German Savings & Loan Society* (1908), 162 Fed. 947, at 953.

⁵⁹ *Cramer v. Iler* (1901), 63 Kan. 579, at 582, 66 Pac. 617; *Waggy v.*

Lumber Co. (1911), 69 W. Va. 666, at 671, 72 S. E. 778.

⁶⁰ *Roseboom v. Whittaker* (1890), 132 Ill. 81, at 89, 23 N. E. 339.

⁶¹ *Jackson v. Lahee* (1885), 114 Ill. 287, at 294, 2 N. E. 172; *Holmes v. McDowell*, 15 Hun 585; affirmed, 76 N. Y. 596; *Law v. Ford*, 2 Paige 310; *Van Alstine v. Cook*, 25 N. Y. 489; *Maynard v. Bond*, 65 Mo. 315.

court, and therefore already operated on by the law. The property, when once in the hands of the court, is pledged and dedicated to the objects of the proceeding.⁶²

To the contrary, a line of cases may be found stating flatly that when a decree appointing a receiver does not state that the ulterior intent of the court was to make an equitable distribution of the property, and contained no restriction upon creditors prosecuting their claims, and the purpose of the receivership was to simply preserve the property, then a judgment subsequently recovered by a creditor is as much a lien on real estate of the defendant as if the appointment of a receiver had never been made.⁶³

It has also been held that in a suit by one partner against the other for settlement of the partnership's concern, the chancery court does not by the appointment of a receiver get such control of the assets of the partnership as to enable it to prevent the firm's creditors from proceeding at law to judgment and execution and levy upon the assets.⁶⁴ After the decree of dissolution, creditors may be enjoined, because then the court provides a mode of collecting the claims.⁶⁵

§ 768. Creditor Suing and Getting Judgment after Appointment of Receiver. Suit may be brought in the appointing court or elsewhere against receivers for torts committed before receivership and subsequent to receivership, provided permission is obtained to bring such suit by the court appointing the receiver, or a state or federal statute permits such suit without permission. Any judgment obtained in such a suit will have to be certified to the court appointing the receiver for payment in whole or in part out of the funds in the hands of such court.⁶⁶

⁶² *Holmes v. McDowell* (1878), 15 Hun 585, at 591; affirmed, 76 N. Y. 596.

⁶³ Original case *Ellicott v. United States Ins. Co.* (1848), 7 Gill. (Md.) 307; followed in *Moore v. Timber Co.* (1896), 83 Fed. 399. See *Johnson v. Garner* (1916), 233 Fed. 756, at 777.

⁶⁴ *Ross v. Titworth* (1883), 37 N. J. Eq. 333.

⁶⁵ *Ross v. Titworth* (1883), 37 N. J. Eq. 333, at 337; *Holmes v. McDowell*, 15 How. 585, dissenting opinion.

⁶⁶ *In re Seaboard Air Line Co.* (1909), 166 Fed. 376. See *Attorney General v. Supreme Council* (1907), 196 Mass. 151, 81 N. E. 966, and cases cited.

Even when a federal statute ⁶⁷ relinquishes to parties and to other courts the right to institute and entertain without leave proceedings against federal court receivers in respect of the conduct of their business, it has reserved to the appointing court sole power over the matter of satisfaction of the rights determined in such other courts.⁶⁸

⁶⁷ Federal Judicial Code, sec. 66, Act of March 3, 1911, ch. 231, 36 Stat. 1104 (United States Comp. St. 1916, sec. 1048).

⁶⁸ Investment Reg. v. C. & M. E. Ry. Co. (1913), 204 Fed. 500, at 507, citing Dillingham v. Hawk, 60 Fed.

497; St. Louis & S. W. Ry. v. Holbrook, 73 Fed. 112; Missouri Pac. Ry. v. Texas Pac. Ry. Co., 41 Fed. 314; Wilcox v. Jones, 177 Fed. 870; Texas & Pac. Ry. v. Johnson, 151 U. S. 81, 38 L. ed. 81, 14 S. C. Rep., 250.

CHAPTER XXVIII

ENFORCEMENT OF COURT ORDERS IN RECEIVERSHIPS

ANALYSIS

- § 769. Enforcement of Court Orders—Generally.
- § 770. Interference with Property in Hands of Receiver.
- § 771. Interference with Receiver Taking Possession of Property.
- § 772. Receiver Obtaining Possession by Summary Proceedings.
- § 773. Receiver Obtaining Possession by Injunction.
- § 774. Receiver Obtaining Possession by Writ of Possession.
- § 775. Receiver Obtaining Possession by Writ of Assistance.
- § 776. Receiver Obtaining Possession by Contempt Proceedings.
- § 777. Territorial Extent of Court's Power to Enforce Its Orders.
- § 778. Intrastate Territorial Extent of Court's Power to Enforce Orders.
- § 779. Title to Property Can Not Be Tried in Contempt Proceedings.

§ 769. Enforcement of Court Orders—Generally. It would be a vain thing for a court to appoint a receiver and make orders affecting parties and affecting the property in the custody of the court, unless the court had power to enforce such orders.

Equity acts in personam, and ordinarily the orders of a court appointing a receiver are directed to the receiver or to parties to the suit or their privies. A most recent United States case, however, seems to lean toward a holding that a receivership is a proceeding in rem.¹ Under our present conceptions of proceedings in rem and in personam, however, it is difficult to see how courts can take this bold step. If they do and hold absolutely that the appointment of a receiver over property is a seizure like the libel of a boat or the libel of food or other articles by the United States government, then the law of receivers will be materially altered, possibly simplified.

¹ *Atlantic Trust Co. v. Chapman* (1907), 208 U. S. 375, 53 L. ed. 656, 28 S. C. Rep. 406.

No rule is better settled than that when a court has appointed a receiver, his possession is the possession of the court for the benefit of the parties to the suit and all concerned and can not be disturbed without leave of court, and that if any person without leave intentionally interferes with such possession, he necessarily commits a contempt of court and is liable to punishment therefor.²

The appointment of a receiver vests in the court no absolute control³ or title in the property, but the receiver acting for the court has the custody of the property⁴ until the court shall, at the conclusion of the case, determine to whom the property or its proceeds shall go.

An order for the appointment of a receiver would be a vain and nugatory proceeding if the court is without the power to enforce it against persons withholding the premises. When the possession is withheld by persons who are parties to the suit or by others claiming under such parties with notice of the appointment of the receiver, there can be no question as to the authority of the court to interfere in a summary way and enforce its order for the surrender of the property by attachment or writ of possession.⁵

If the party who refuses to surrender is within the jurisdiction of the court, he may be guilty of contempt although the property is outside the jurisdiction. If the party is outside the jurisdiction of the court and the property is outside also, the court can not enforce its order.

If the property is within the jurisdiction of the court, that is, within the boundaries of the county or even the state wherein the court can send its officer or process, then the court

² *Beverly v. Brooks* (1847), 4 Gratt. (Va.) 208; *In re Dialogue* (1914), 215 Fed. 462, at 464; *In re Tyler*, 149 U. S. 164, 37 L. ed. 689; *In re Swan*, 150 U. S. 637, 37 L. ed. 1207; *Royal Trust Co., et al., v. Washburn B. & I. R. R. Co.*, 139 Fed. 865; *Bessette v. Conkey*, 194 U. S. 324, 48 L. ed. 997; *McKinnon-Young v. Stockton* (1907), 53 Fla. 735, 44 So. 237.

³ *Kneeland v. American L. & T. Co.* (1889), 136 U. S. 89, 34 L. ed. 379, 10 S. C. Rep. 950.

⁴ *Beverly v. Brooke* (1847), 4 Gratt. (Va.) 1208.

⁵ *Thornton v. Washington S. B.* (1882), 76 Va. 432; *Camden v. Virginia S. D. & T. Co.* (1913), 78 S. E. 596, 115 Va. 20; *Ex parte Cohen* 5 Cal. 494.

can properly protect its orders and may issue a writ of attachment or writ of possession and have it enforced in another county if the laws of the state permit it. Of course the process of the court can not go outside of the state.

§ 770. Interference with Property in Hands of Receiver.

When a property is legally and properly in the possession of the receiver it is the duty of the court to protect that possession, not only against acts of violence, but also against suits at law, so that a third person claiming the same may be compelled to come in and ask to be examined "pro interesse suo" if he wishes to test the justice of such claim.⁶

There is no question but that the court will not permit a receiver appointed by its authority, and who is therefore its officer, to be interfered with or dispossessed of the property he is directed to receive by anyone.⁷ Although the order appointing him may be perfectly erroneous, this court requires and insists that application should be made to the court for permission to take possession of any property of which the receiver either has taken or is directed to take possession, and it is an idle distinction which could not be maintained, if it were attempted, that this rule only applies to property actually in the hands of the receiver. If a receiver be appointed to receive debts, rents or tolls, the rule applies equally to all these cases; and no person will be permitted without the sanction or authority of the court to intercept or prevent payment to the receiver of the debts, rents or the tolls which he has not actually received, but which he has been appointed to receive.⁸

§ 771. Interference with Receiver Taking Possession of Property. It is the duty of the receiver to take possession of

⁶ *Parker v. Browning* (1840), 8 Paige 388; *Strain v. Superior Court* (1914), 168 Cal. 216, 142 Pac. 62.

⁷ *In re Dialogue* (1914), 215 Fed. 462, at 464; *In re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 S. C. Rep. 785;

In re Swan, 150 U. S. 637, 37 L. ed. 1207, 14 S. C. Rep. 225; *Royal Trust Co., et al., v. Washburn B. & I. R. R. Co.*, 139 Fed. 865.

⁸ *Ames v. Trustees* (1855), 20 Beav. 332.

the property covered by the court's order appointing him. If the person who has possession refuses to deliver it up, if he is a party to the bill, he may be proceeded against for contempt.⁹ If the property is in the possession of a third person who claims the right to retain it, the receiver by leave of court must either proceed by suit in the ordinary way to try his right to it, or the complainant or petitioner in the main suit should make such third person a party to the main suit and apply to have the receivership extended to the property in his hands so that the order for the delivery of the property may be made which will be binding upon him, and which may be enforced by process of contempt if not obeyed.¹⁰

Tampering with employees and inducing them to leave a business that is being carried on under the direction of the court, with the view of taking employment in a business that is being started in opposition, is an interference against which the receiver and manager is entitled to protection. Injunction is allowed on motion of plaintiff in case.¹¹

A proceeding by a receiver to enjoin another from interfering with his possession of property may properly be by petition in the suit in which he was appointed, although the proposed defendant is not a party to such suit, when his rights can be as fully protected in such proceeding as in a separate suit, which is a matter to be determined by the court in the exercise of its discretion.¹²

It has been held that it is not necessary that a party interfering with or obstructing the receiver in his effort to take possession of the property should have been officially notified of the receivership, provided actual knowledge of the making of the order had been brought home to such party.¹³

⁹ *Morrill v. Noyes* (1863), 56 Me. 458, at 463.

¹⁰ *Morrill v. Noyes* (1863), 56 Me. 458, at 463; *Parker v. Browning* (1840), 8 Paige 388; *State v. McClure* (1913), 17 N. M. 694, 133 Pa. 1063.

¹¹ *Dixon v. Dixon* (1904), 1 Ch. D.

¹² *Lake Shore v. Felton* (1900), 103 Fed. 227, at 229; *City of Shelbyville v. Glover* (1910), 184 Fed. 234, at 237; *Ex parte Chamberlain* (c.c.), 55 Fed. 704.

¹³ *Blaise v. Security Brewing Co.* (1909), 124 La. 979, 50 So. 816.

Seizure of property of a corporation after the appointment of a receiver and before the receiver takes possession has been held a contempt of court.¹⁴

While prior liens are not divested by the appointment of a receiver, and he takes the property subject to all existing liens, lien creditors can not enforce their claims and thus disturb his possession without the permission of the court.¹⁵

Where a party intervenes, sets up his title to the property and asks to have the same relieved from the custody of the receiver he submits his rights in the premises to the court for its adjudication.^{15a}

Where the property is in the possession of a third person under a claim of title, the court will not protect the officer who attempts by violence to obtain possession any further than the law will protect him, his right to take possession of property of which he has been appointed receiver being unquestioned.¹⁶

§ 772. Receiver Obtaining Possession by Summary Proceedings. A party to the action may be summarily compelled to transfer to the receiver any portion of the copartnership property he now holds.¹⁷

When a question of title is raised this can not be disposed of in a summary proceeding.¹⁸

The proceeding to be taken to compel a defendant to deliver up possession of land must first be an order to deliver possession.¹⁹ This is generally found embodied in the order appointing a receiver. The receiver should formally make demand; if it is refused, he should report the same to the court. Then the receiver should apply to the court for an

¹⁴ *Generotzky v. Barney Hotel Co.* (1915), 85 N. J. E. 63, 95 Atl. 865.

¹⁵ *Forest Lake Cemetery v. Baker* (1910), 113 Md. 529, 77 Atl. 853; appeal, 858.

^{15a} *State v. McClure* (1913), 17 N. M. 694, 133 Pa. 1063.

¹⁶ *Parker v. Browning* (1840), 8 Paige 388.

¹⁷ *Murphy v. Du Berg* (1882), 11 Ab. N. C. 112.

¹⁸ *Thompson v. Smith* (1870), 1 Dill. 459, Fed. Cas. No. 13977; *Sachs v. Sachs* (1913), 181 Ill. App. 342, at 345.

¹⁹ *Green v. Green* (1829), 2 Sim. 431.

order that service of a writ of execution of the order to give up possession be served on the defendant.²⁰ It should be accordingly served.

If then possession is not given up, the receiver should make application to the court for a writ of assistance. This, when issued, should be properly served. If this is not obeyed, the receiver should apply to the court for an order of attachment against the person of the defendant for not obeying the original order appointing a receiver and ordering the defendant to give up possession.²¹ When the attachment issues it is directed to the sheriff against the defendant. The court may direct that the attachment should not be executed and make an order for an injunction for the defendant to relinquish possession of the premises within a certain time. If this is not obeyed, the court may make an order for a writ of assistance directed to the sheriff to put the receiver in possession of the premises.²²

When the proceeding is taken by a receiver appointed in a suit to which the proposed defendant is a stranger, the question whether it should be by bill (that is to say by a plenary action) or petition (that is, a summary action) is one resting to a certain extent on the discretion of the court having regard to the particular circumstances.

A leading purpose in determining it will always be to afford the defendant full opportunity to assert and obtain the benefit of his defense. When the property concerned is already in the possession of the court, it is not unusual to allow the receiver to proceed by petition, giving the defendant the opportunity of making defense by answer or other pleading according to the common cause of equity practice. Upon hearing, a rule may be issued to the defendant to show cause with the usual restraining order.²⁵

²⁰ *Dove v. Dove* (1783), 2 Dickson 621; *Green v. Green* (1828), 2 Sim. 401.

²¹ *Green v. Green* (1828), 2 Sim. 401.

²² *Ferguson v. Tadman* (1828), 2 Sim. 410.

²⁵ *Lake Shore & M. S. Ry. Co. v. Felton* (1900), 103 Fed. 227; *City of*

When a bank has deposits which a receiver was appointed to receive, the conduct of the bank in preventing the receiver from obtaining the possession of that which he was appointed to receive may be in fraud of the court's order. In such case the bank should intervene pro interesse suo and set up its rights, for the possession of the receiver is but the possession of those having a right thereto, and would not defeat any title, claim or right which it might have in a fund which it received after the receiver's title to the possession accrued. In respect to such deposits, a petition by the receiver to prevent such interference and to compel the surrender of the funds so seized is not bad practice and does not deprive the defendant of a full and orderly hearing, and its rights are and will be as fully protected as in an independent suit.²⁶

Where a bank to which an insolvent corporation was indebted was not a party to an action by a stockholder for the administration of the corporation's assets, it was error for the court to direct the bank to pay over to the receiver of the corporation the amount of the corporation deposits, with the bank pending a determination of the bank's right to set off such deposit against the corporation debt.²⁷

Where a receiver has been appointed for a corporation in one county the appointment of an ancillary receiver four days later by the court of another county has been held to be an unauthorized proceeding, because the assets of the corporation located in such other county are still under the dominion of the court which made the original appointment. Where, in such a case, a bank located in the county where the attempt was made to appoint an ancillary receiver refuses to pay over to the original receiver assets in its hands belonging to the corporation, the proper proceeding is for such court to order its receiver to demand payment of the bank, and upon failure

Shelbyville v. Glover (1910), 184 Fed. 234; Camden v. Virginia S. D. & T. Co. (1913), 115 Va. 20, 78 S. E. 596.

²⁶ Horn v. Pere Marquette R. Co. (1907), 151 Fed. 626.

²⁷ Wheaton v. Daily Tel. Co. (1903), 124 Fed. 61; compare this case with Horn v. Pere Marquette Ry. (1907), 151 Fed. 626, at 627.

of the bank to pay him, to forthwith institute plenary suits to recover the amounts of the deposits. The original court can not proceed summarily against such bank because the bank had never been within the court's jurisdiction.²⁸

It is very hard to draw a definite line as to where a receiver can proceed summarily and where the defendant in such a proceeding is entitled to a separate suit.

In *Gelpeke v. M. & H. R. R. Co.*, 11 Wis. 477, at 481, the court goes into the question very carefully, and says: "I know of no case where it has been adjudicated that the possession of a stranger, who sets up a superior title in pursuance of which he claims to have entered and to hold, might be disturbed. In such case it has been the uniform rule to leave the parties to their remedy by action."²⁹

As a general rule, the court will not interfere in a summary way as against the possession of a stranger to the action claiming by paramount title, but will leave the question of title to be tried by a proper action to be brought for that purpose.³⁰

Of course, before a summary action can be had against a stranger to the main suit, he should by leave of court be made a party defendant and be properly served.

This summary proceeding is instituted by the receiver at the instance of the plaintiff in the receivership case filing in the case a petition against the party in possession who is withholding the same from the receiver. This petition should describe the land in controversy, and set out a demand by the receiver for possession claim an interference with the receiver in the discharge of his trust, also a prayer that the court issue a rule upon the party withholding possession that he appear at a certain date and answer to the rule and set up some right or title of which he had or should claim the right of trial by jury, in which case the rule would be discharged without

²⁸ *Tenth Nat. Bank v. Construction Co.* (1910), 227 Pa. 354, 76 Atl. 67.

²⁹ *Gelpeke v. M. & H. R. R. Co.* (1861) 11 Wis. 477, at 481.

³⁰ *Thornton v. Washington S. & B.* (1882), 76 Va. 432; *Sachs v. Sachs* (1913), 181 Ill. App. 342, at 345.

any attempt to determine or adjudge the truth of the answer, otherwise the court would entertain such rule and upon a hearing determine and enforce the rights of the receiver against a party accused of interference with the receiver's possession or management.³¹

This power does not conflict with the provision of law which provides that no man shall be deprived of his property without due process of law. The surrender to the receiver does not affect the right of property or the ultimate decision of the case any more than does the levy of an attachment. The design is to secure the property so that it may be handed over to the party who shall be adjudged entitled to the possession.³²

§ 773. Receiver Obtaining Possession by Injunction. By the appointment of a receiver, the court by its officer, the receiver, acquires possession of the property and has jurisdiction over the entire subject-matter of the suit, every part and parcel thereof. No one, whoever he may be, even the sheriff, can interfere with it without the sanction of the court. An injunction will issue by the court against a sheriff upon a petition of the receiver enjoining the sheriff from interfering with the property belonging to the petitioner as receiver, and an order made on the sheriff that the property be restored to the custody of the receiver.³³ Injunction will also lie against others than the sheriff.

The writ of injunction is a valid remedy when attachment and imprisonment for contempt might have been used by the chancellor.³⁴

When an order is made on a party to turn over property to a receiver, it is not sufficient for such party to show that he was not officially apprised of such appointment and order,

³¹ *Sullivan v. Colby* (1886), 71 Fed. 460.

³² *In the Matter of Cohen v. Jones* (1855), 5 Cal. 494.

³³ *Ex parte Chamberlain* (1893), 55 Fed. 704. See also case reviewed

in *In re Tyler* (1893), 149 U. S. 164, 37 L. ed. 689.

³⁴ *Marshall v. Lockett* (1884), 76 Ga. 289; *Vestel v. Tasker, Receiver* (1905), 123 Ga. 213, 51 S. E. 300.

if he had actual notice of the order requiring him to make such delivery.³⁵

An attempt to deprive a receiver of his possession is ordinarily a contempt and the claimant may be restrained by injunction. Lien creditors can not enforce their claims and thus disturb the receiver's possession without the permission of court.³⁶

An injunction should not issue at the suit of a receiver to enjoin a creditor who has garnisheed funds of the corporation from proceeding with his suit. If claimant had obtained a valid lien on the fund, it was not dissolved by the filing of the bill and appointment of a receiver, but may be enforced.³⁷

§ 774. Receiver Obtaining Possession by Writ of Possession. Some courts hold that a receiver may recover possession of property withheld by parties to the suit, or by others claiming under such parties, in a summary way by a writ of possession.³⁸ A statutory writ of possession is unknown in some states. A writ of ejectment³⁹ may be by statute. Such statutes generally provide inter alia "if the plaintiff states in his petition that he has a legal estate." A receiver has not a legal estate unless he has a deed from the owner. Therefore, a receiver can not ordinarily bring ejectment.

§ 775. Receiver Obtaining Possession by Writ of Assistance. Dempsey, J., in *Stephenson v. Giltenau*⁴⁰ says: "When it becomes necessary to the due performance of his duties by a receiver of real estate that he should have the actual possession of such real estate, a writ of assistance will issue in equity to put him into such possession. Such writ will issue,

³⁵ *Lewis v. Singleton* (1878), 61 Ga. 164; *Drakeford v. Adams* (1896), 98 Ga. 722, 25 S. E. 833.

³⁶ *Forest Lake Cemetery v. Baker* (1910), 113 Md. 529, 77 Atl. 853; appeal, 853.

³⁷ *Rickman v. Rickman* (1914), 180 Mich. 224, 146 N. W. 609.

³⁸ *Thornton v. Washington S. & B.* (1882), 76 Va. 432, at 436.

³⁹ Ohio General Code, sec. 11903.

⁴⁰ *Stephenson v. Giltenau* (1898), 5 Ohio N. P. 419.

not upon the application of the receiver, but only upon the application of a party to the cause.”

These propositions are supported in a note to the old English case of *Sharp v. Evans*.⁴¹

A study, however, of this case and other cases of high authority in England and America⁴² will disclose that the writ of assistance only issued when the rights of the respective parties to be affected by it had been fully determined by the judgment in the action.⁴³

Although a writ of assistance might properly be the remedy to put a purchaser at a sheriff's sale in possession of the premises⁴⁴ when the rights of the parties have been fully determined by the decree, it would seem that it is not the proper remedy to put a receiver in possession of premises, because the appointment of the receiver has not and should not finally determine the rights of parties to the suit or third parties.

§ 776. Receiver Obtaining Possession by Contempt Proceedings. An order appointing a receiver is in the nature of an injunction or writ of sequestration preventing any alienation of or interference with the property without the consent of the court. Any meddling with the control or possession of the receiver, whether forcibly or by legal proceedings, without the permission of the court, is contempt of court and punishable.⁴⁵

A libel on the business carried on by a receiver and manager appointed by the court is contempt of court and may be punished by committal of the offender.⁴⁶

⁴¹ *Sharp v. Evans* (1735), 3 P. Wms. 374, at 379.

⁴² See cases cited under *Stanley v. Sullivan* (1888), 71 Wis. 585, 37 N. W. 801.

⁴³ *Stanley v. Sullivan* (1888), 71 Wis. 585, at 587, 37 N. W. 801.

⁴⁴ *Tetterbach v. Meyer* (1888), 10 Ohio Dec. Rep. 212, 19 Ohio Bull. 221.

⁴⁵ *Thornton v. Washington Sav. B.* (1882), 76 Va. 432; *Strain v. Super-*

rier Court (1914), 142 Pac. 62, 168 Cal. 216; *In re Dialogue* (1914), 215 Fed. 462, at 464; *In re Tyler*, 149 U. S. 164, 37 L. ed. 689; *In re Swan*, 150 U. S. 637, 37 L. ed. 1207; *Royal Trust Co., et al., v. Washburn B. & I. R. R. Co.*, 139 Fed. 865; *Camden v. Virginia S. D. & T. Co.* (1913), 78 So. 596, 115 Va. 20.

⁴⁶ *Helmore v. Smith* (1886), 35 Ch. D. 426,

A seizure of partnership assets in the possession of a receiver appointed by the court, of which the execution creditor had notice, is held to be a contempt on the part of the execution creditor and the sheriff. The court, in this class of cases, does not ordinarily punish the offense by actual committal; it uniformly makes those who have committed such contempt pay the costs and expenses occasioned by the improper conduct of those guilty of the contempt.⁴⁷

Wherever the title of its officers, whether receiver or committees, is disputed, the court has no choice; it can not allow any proceedings of the kind to go on without abandoning its own jurisdiction.⁴⁸

The ordinary procedure in such cases is by petition brought by the plaintiff or by the receiver⁴⁹ asking the court to issue a rule calling upon the party withholding the assets to appear before the court at a day fixed and show cause why he should not surrender to the receiver the property, real or personal, and on the hearing the court may determine and enforce the rights of the receiver against the party accused of interference with the possession or management unless his answer should set up some right or title of which a trial by jury is claimed.⁵⁰

When the court determines the right in the receiver an order should be made upon the party withholding it to surrender; in default the court having the party before it may find him in contempt of court and imprison him until he performs the order.⁵¹

Contempt in some states is governed by statute,⁵² and the statutes should be followed. If the contempt is in the presence of the court, then the court can proceed summarily.⁵³ Contempt not in the presence of the court may be defined by statute. In such case a charge in writing should be filed with the clerk,

⁴⁷ Lane v. Sterne (1862), 3 Giff. 629.

⁴⁸ Aston v. Herman (1834), 2 M. & K. 390.

⁴⁹ Railroad Co. v. Railroad Co. (1873), 46 W. 792.

⁵⁰ Sullivan v. Colby (1896). 71 Fed. 460; In re Swan, 150 U. S. 637, 37 L. ed. 1207.

⁵¹ Ohio General Code, sec. 12143.

⁵² Ohio General Code, sec. 12136, et seq.

⁵³ Ohio General Code, sec. 12136.

etc., and the proceeding then should be in the name of the state.⁵⁴

When a contempt proceeding is based on an affidavit, such affidavit must show facts constituting a contempt, or the court acquires no jurisdiction to proceed in the matter.⁵⁵

§ 777. Territorial Extent of Court's Power to Enforce Its Orders. Courts of equity act in personam, and when the court appointing a receiver makes an order upon a party to the cause before the court, the court can enforce this order, even if the property affected by this order lies outside of the county, or even outside of the state. Such power of a court of equity was early ruled upon by the celebrated case of *Penn v. Lord Baltimore*.⁵⁶ However, a court of chancery will not entertain a bill where the relief sought renders it necessary that it should act upon the specific thing, unless the subject-matter of the litigation is within the jurisdiction.⁵⁷

The exercise of this jurisdiction of a court of equity directed against a person before the court in no manner, however, can interfere with the supreme control over the property by the state within which it is situated.⁵⁸

The leading case of *Booth v. Clark*⁵⁹ fixed the law of the United States courts that an equity receiver has no extra-territorial power of official action, none which the court appointing him can confer with authority to enable him to go into a foreign jurisdiction and take possession of the debtor's property. The Ohio Supreme Court has to a great extent refused to follow *Booth v. Clark*, and ruled that a Kentucky receiver may come

⁵⁴ *In re Mannberger* (1900), 19 O. C. C. 651; *State, ex rel., v. Clemants* (1849), 1 Ohio Dec. Rep. 278. See *Galley v. Galley* (1910), 13 O. C. C. (N.S.) 522.

⁵⁵ *Hutton v. Superior Court*, 147 Cal. 156, 81 Pac. 409; *Strain v. Superior Court* (1914), 142 Pac. 62, 168 Cal. 216.

⁵⁶ *Penn v. Lord Baltimore* (1750), 1 Ves. Sr. 444; *Massie v. Watts* (1810), 6 Cranch 148; *Mitchell v. Bunch* (1831), 2 Paige 615; *Besuden v. Besuden Co.* (1896), 4 O. D. 144.

⁵⁷ *Enos v. Hunter* (1847), Gilm. (Ill.) 212.

⁵⁸ *Penn v. Lord Baltimore* (1750), 1 Ves. Sr. 444; *Massie v. Watts* (1810), 6 Cranch 148, 3 L. ed. 181; *Watkins v. Holman* (1825), 16 Pet. 25, 10 L. ed. 873; *Corbett v. Nutt* (1870), 10 Wal. 464, 19 L. ed. 976.

⁵⁹ *Booth v. Clark* (1854), 17 How. 322, 15 L. ed. 164; *Second Nat. Bk. v. W. C. Sterrett, Receiver*, decided by United States Circuit Court of Appeals, Sixth Circuit, December 4, 1917. See ch. XVIII, supra, "Foreign and Ancillary Receivers."

into Ohio and assert his right to possession of certain chattels.⁶⁰ Even though an Ohio court may recognize a Kentucky receiver as such, nevertheless, an order by the Kentucky court could not act directly on either chattels or land in Ohio.

It has been held that contempt of court may be committed by persons not parties to the proceeding, even though the alleged interference is without the territorial jurisdiction of the court, provided the alleged offenders are within the territorial jurisdiction.⁶¹

§ 778. Intrastate Territorial Extent of Court's Power to Enforce Orders. In a suit properly brought in one county of a state, a county court having equity powers appoints a receiver over property, some of which is real estate lying in a distant county of the same state. Has the court jurisdiction to hold that property as against any other court of the state? The test must be, can the appointing court in one county enforce an order covering real estate in another county?

If a party to the suit and before the court interferes with the property in question, he can be proceeded against as for contempt, because the court can act in personam against him. Suppose a person not a party to the suit proceeds to interfere with the property in one county, can the court in another county protect its custody?

A person is guilty of contempt by statute,⁶² for instance, by reason of disobedience of or resistance to a lawful writ, process, order, rule, judgment or command of a court or an officer.

In some states process may be issued by the court to bring the accused party into court.⁶³

The legal meaning of the word process varies according to the context subject-matter and spirit of the statute in which it

⁶⁰ Bank v. McLeod (1882), 38 O. S. 174.

⁶¹ Strain v. Superior Court (1914), 168 Cal. 216, 142 Pac. 62; Chafee v. Quidwick, 13 R. I. 442;

Richards v. People, 81 Ill. 551; Sercomb v. Catlin, 128 Ill. 556, 21 N. E. 606.

⁶² Ohio General Code, sec. 12137.

⁶³ Ohio General Code, sec. 12138.

occurs. The process of the court, in its narrowest sense, means the writs and mandates of the court under the seal thereof.⁶⁴

If a court has power to issue process into another county and lay its hands on a party interfering with property in that county and in custody of the court appointing the receiver, then that court can bring such party before it and punish him for interference. The following cases illustrate the rule:

Where an action was instituted for the possession of land situated in the county of D., and on change of venue the cause was removed to the circuit court of another county, the latter court had power to enforce obedience to its process and to punish for contempt those who resisted the officers charged with the execution of that process. The fact that the land was situated in another county does not affect the jurisdiction of the court whose process was resisted. A writ was issued from the M. county court to the sheriff of D. county, commanding him to put McD. in possession of the land. It was the process of the M. Circuit Court that was resisted by the parties in D. county, and the M. Circuit Court was the proper tribunal to punish those who were guilty of contempt in resisting its process and the officers charged with the duty of executing that process.⁶⁵

A Wisconsin case treats the subject as follows: "It is further maintained that the alleged offense having been committed in M. county (refusal to testify before a commissioner), the appellant can not lawfully be punished therefor in F. county, where the case was pending. It is provided by statute that every court of record shall have power to punish by fine and imprisonment, or either, any neglect or violation of duty, or any misconduct, by which the rights or remedies of a party in an action or proceeding depending in such court or triable therein, may be defeated, impaired, impeded or prejudiced in the following cases: * * *

"The commissioner was acting for that court when the action was depending. We think that county lines have no significance

⁶⁴ United States v. Murphy (1897), 82 Fed. 893.

⁶⁵ Hawkins v. The State, 125 Ind. 570, 25 N. E. 818.

in such a case, but that the court wherein the action is pending may lawfully take action on the report of the commissioner, and make such an order in the premises as will indicate the authority of the court and protect the rights of the parties to the suit therein, no matter in what county of the state the offense was committed.

“This is our reading of the statutes on the subject, and in the absence of statutory provisions, we can not doubt the court would have the same power under well-established common-law principles.”⁶⁶

§ 779. Title to Property Can Not Be Tried in Contempt Proceedings. Title or the right to property can not be tried in a contempt proceeding. What is meant by this well-settled rule is that a court in such a proceeding can not by its order take property from the actual possession of a stranger to the action in which a receiver is appointed who claims title to it or right to its possession. Such an order would be void, because one in possession of property can not be dispossessed without due process of law, which means an appropriate action brought against him whereupon issues framed and a regular trial before a court or jury, his title or right to retain possession may be determined, and a proceeding in contempt is not such an action.⁶⁷

⁶⁶ *State v. Lanning* (1879), 48 Wis. 348, 4 N. W. 390.

⁶⁷ *Strain v. Superior Court* (1914), 142 Pac. 62, at 66, 168 Cal. 216.

CHAPTER XXIX

LIABILITIES OF RECEIVER

ANALYSIS

§ 780. Classification of Liabilities Resulting from Activities.

- (a) Activities of Receiver under Expressed Court Order.
- (b) Activities of Receiver under Implied Power.
- (c) Activities of Receiver without Expressed or Implied Power.
- (d) Activities of Subordinates of Receiver.
- (e) Activities of Receiver without Color of Authority.

§ 781. Classification of Liabilities Resulting from Engagements.

- (a) Engagements of Receiver under Expressed Court Order.
- (b) Engagements of Receiver under Implied Power.
- (c) Engagements of Receiver without Explicit or Implied Court Order.
- (d) Engagements of Subordinates of Receiver.
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§ 785. Liability of Receiver for His Own Torts—American Doctrine.

§ 786. Liability of Receiver for His Subordinate's Torts—English Doctrine.

§ 787. Liability of Receiver Officially for His Subordinate's Torts—American Doctrine.

§ 788. Liability of Receiver for His Contracts—English Doctrine.

§ 789. Liability of Receiver for His Contracts—American Doctrine.

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- § 817. Liability of Receiver for Losses in Running a Business.
- § 818. Suit on Receiver's Bond.
- § 819. Release of Receiver's Surety by Court under Statute.
- § 820. Parties Dealing with Receiver Charged with Knowledge.

§ 780. Classification of Liabilities Resulting from Activities.^{67a} The activities entered into by the receivership management of property may be divided under five headings with reference to the liabilities following or resulting from such activities:

(a) Activities of Receiver under Expressed Court Order.

If the court orders the receiver to do some act which if done by the receiver in his individual capacity would be a tort, never-

^{67a} See sec. 784, et seq., *infra*.

theless such an act, if done under lawful, expressed and explicit orders of court, can not be a tort. A tort is among other things an act committed in disobedience of the law. If an act is done in obedience to a direct lawful command of the court having jurisdiction in the matter and power to make the order, it can not be a tort and the doer can not be held responsible in damages or held criminally liable by the same sovereign power which acting through the court commanded him to do the act. A party injured by such act must seek redress from the court appointing the receiver or by review of such court's orders if the appointing court had jurisdiction in the matter but acted improperly. If the appointing court had not jurisdiction, even then it seems but proper that such injured party should seek redress from that court rather than promote an unseemly conflict between courts by going into another court.¹

(b) Activities of Receiver under Implied Power. In a receivership covering large property and great activities it is impossible for a court order to explicitly cover every conceivable activity into which it may be proper for the receiver to enter. Emergencies may arise and the receiver must take the responsibility of acting, relying upon the court to approve his action upon a proper showing of its necessity and propriety.² If the power to perform by the receiver is undoubtedly implied by the order, the doing of the same must be as if it had been explicitly and expressly ordered.³ However, a receiver is handling other people's property. He is in a sense a trustee. He may apply to the court for instructions at any time. If he is in doubt as to his rights or power, he should apply to the court for instructions.

(c) Activities of Receiver without Expressed or Implied Power. The activities of a receiver may be within the scope of

¹ *Searle v. Choat* (1884), C. A. 25 Ch. D. 723; *Curran v. Craig* (1884), 22 Fed. Rep. 102.

² *State v. Railway Co.* (1895), 45 S. C. 464, at 469, 23 S. E. 380 and 383.

³ *Haines v. Buckeye Wheel Co.* (1915), 224 Fed. 289, at 295;

Cake v. Mohun (1896), 164 U. S. 311, at 316, 41 L. ed. 447; *Barton v. Barbour*, 104 U. S. 126, at 135, 26 L. ed. 672; *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287, at 293, 34 L. ed. 408.

the receivership and may be done under color of his office yet without expressed or implied power of the appointing court. For instance, a receiver is ordered to run a railroad or other public utility or business. If the receiver, under color of his office and within the scope of the receivership, runs the railroad with negligence or misfeasance, or malfeasance, and injuries occur, it can not be said that the court, either expressly or impliedly, ordered him to commit such acts resulting in injury.

Under such circumstances if the receiver was the actor and he and not his subordinates actually committed the injury complained of, it is difficult to see on what principle of law it can be said that he is not primarily liable for such injury.* And yet the Supreme Court of the United States used very broad language in *McNulta v. Lochridge*,⁵ and Mr. Justice Brown said: "Actions against the receivership, or the funds in the hands of the receiver and his contracts, misfeasances, negligences and liabilities, are official and not personal, and judgments against him as receiver are payable only from the funds in his hands." Bold as this decision is, it is the well-established law of America,⁶ but must be read with certain explanations.⁷

(d) Activities of Subordinates of Receiver. The subordinates of the receiver may perform acts within the scope of the receivership without any direct authorization of the court. If these acts are done negligently or there is misconduct or misfeasance or malfeasance in performing such acts which would amount to a tort if happening when the railroad or other property was run other than under the receivership, then serious questions arise as to the liability. The court can not be liable

* *Archambeau v. Platt* (1898), 173 Mass. 249, 53 N. E. 816, in which Mr. Justice Holmes agrees that a receiver's liability in a case like the above is personal, but in certain cases he may be indemnified; but the decisions in America making such a receiver liable officially, bold as they may be, must be followed.

⁵ *McNulta v. Lochridge* (1891), 141 U. S. 327, at 332, 35 L. ed. 796,

12 S. C. Rep. 11. See *Texas & Pac. Ry. Co. v. Cox* (1891), 145 U. S. 597, 36 L. ed. 829, 12 S. C. Rep. 905; *Farmers L. & T. Co. v. Central R. R.* (1880), 7 Fed. 537; also *Atlantic Trust Co. v. Chapman* (1907), 208 U. S. 371, 52 L. ed. 528, 28 S. C. Rep. 360.

⁶ *Archambeau v. Platt* (1899), 173 Mass. 249, 53 N. E. 816.

⁷ See sec. 789, *infra*, in the Matter of Receivers' Contracts.

because it can not commit a tort. The receiver can not be liable because like a trustee he is not responsible for the torts of his subordinates when he has not been negligent in engaging such subordinates.⁸ Shall the subordinates be liable? The American courts release the receiver from responsibility in such a case.⁹ They place the responsibility on the res as best they can.¹⁰

(e) Activities of Receiver without Color of Authority. A receiver frequently, under the name of the court, gets possession of property which is beyond the order of the court appointing him or otherwise he has no right to get possession of property. When he acts beyond the court's order, he acts without official sanction and acts as an individual. The fact that he is an officer of the court and has rightful possession of certain property as an officer of the court ought not to be a defense to his tortious action in taking other property or doing other tortious acts or deprive parties of their right to redress.¹¹ The receiver being *sui generis* is personally responsible for any wrong *ex contractu* or *ex delicto* which he may have committed.¹² If a receiver acts beyond the scope of his receivership, or without color of authority, he, of course, does not act as a receiver and the protection usually accorded receivers does not extend to such acts.¹³

Until the receiver is discharged, he is still accountable to the court of his appointment, not only for his authorized acts, but for whatever he has done in the name of the court and under color of his office, although outside the scope of his authority. The party complaining of the receiver's unauthorized act in

⁸ *Cardot v. Barney* (1875), 63 N. Y. 287; *Meara v. Holbrook* (1870), 30 O. S. 148.

⁹ *Cardot v. Barney* (1875), 63 N. Y. 287; *Farmers L. & T. Co. v. Central R. R.* (1880), 7 Fed. 537.

¹⁰ *McNulta v. Lochridge* (1891), 137 Ill. 270, 27 N. E. 452; *McNulta v. Lochridge* (1891), 141 U. S. 327, 35 L. ed. 796; *Texas & Pac. Ry. Co. v. Cox* (1891), 145 U. S. 597, 36 L. ed. 829.

¹¹ *Gutsch v. McIlhargey* (1888), 69 Mich. 379, 37 N. W. 303; *Brooke v. Kettler* (1910), 166 Ala. 76, 51 So. 940, citing *Hills v. Parker*, 111 Mass. 508; *Keney v. Ranney*, 96 Mich. 617, 55 N. W. 982.

¹² *In re Erie Lumber Co.* (1906), 150 Fed. 817, at 830.

¹³ *Kirt v. Kane*, 87 Mo. App. 279; *Haines v. Buckeye Wheel Co.* (1915), 224 Fed. 289; *Kain v. Smith* (1880), 80 N. Y. 458, at 470.

such case may intervene,¹⁴ or he may bring an independent suit.¹⁵

§ 781. Classification of Liabilities Resulting from Engagements.^{15a} The engagements entered into by the receivership management of property may be divided under five headings with reference to the liabilities following or resulting from such engagements.

(a) Engagements of Receivers under Expressed Court Order.

A receiver may be ordered by the court to enter into engagements with third parties not parties to the suit. The receiver may be ordered to borrow money and either directly or indirectly agree to pay back that money or enter into other engagements. What is the status of such an engagement? The court can not contract to pay that money back or do any other act and be liable as an individual, because it is the judicial arm of the sovereign power. Furthermore, the court has no funds of its own out of which to pay in case the receivership funds give out. The court does not make a promise to pay back the money, neither do the parties to the cause make such a promise, and when the court directs the officer directly to make such an engagement, neither does the receiver as an individual make such a promise. But the court, by virtue of the custody of the property and its jurisdiction of the parties, pledges its own faith to the lender that it will enforce a quasi-lien against the property and the parties as a condition of its releasing the property by sale or otherwise and of its enforcing any equities in favor of those who invoke its assistance.¹⁶

Said Caldwell, J., writing the opinion for the Eighth Circuit Court of United States:¹⁷ "When debts of the receiver were contracted in pursuance of the order of the court, the credit is

¹⁴ *Haines v. Buckeye Wheel Co.* (1915), 224 Fed. 289, at 297; *Vette v. Mills* (1916), St. Louis Ct. of App., 185 S. W. 735.

¹⁵ *In re Erie Lumber Co.*, 150 Fed. 817; *Haines v. Buckeye Wheel Co.* (1915), 224 Fed. 289, at 297.

^{15a} See sec. 788, et seq., *infra*.

¹⁶ *Tafe, J.*, in *Mercantile T. Co. v. Kanawha* (1893), 58 Fed. 6.

¹⁷ *Bank of Commerce v. Central C. & C. Co.* (1902), 115 Fed. 878, at 879.

given to the court. The railroad company (defendant) was not liable for such indebtedness. The creditors knew they must look to the court alone for payment, but they also knew that it was the duty of the court contracting this indebtedness to discharge the same if the property or its proceeds in its custody and possession was adequate for that purpose." The debts contracted by the court are not the debts of the railroad company and the company is not liable for them. "The court alone is liable for its debts. That obligation imposed on the court the duty to apply the property or its proceeds in its custody and control to the payment of the debts contracted by it in and about the management of the property."¹⁸ Judicial repudiation of obligations is not to be sanctioned under any conditions. One of the chief duties of courts of justice is to compel delinquent debtors to pay their debts. It could do this with poor grace, indeed, if it neglected to pay its own debts when it had means to do so. It is true that the errors and mistakes of courts, though they may ruin a citizen, are placed in the category of injuries produced by the law and for which the law furnished no redress. * * * While a court can not be adjudged a bankrupt, and no proceedings can be taken against it to enforce payment of its obligations, these very facts make it all the more important that it should scrupulously observe its obligations to the citizen. A court that would fail to do this would speedily and justly forfeit the respect and confidence of the public."¹⁹ The court orders the engagement entered into, and yet the court itself can not be held responsible in the sense that it must respond in damages for failure to carry out the engagement. The receiver is ordered to enter into the engagement. He is the contractual party, and yet "the court in a substantial sense makes the contract."²⁰ The receiver as an individual can not be held to respond in damages, because he must obey the lawful order of the court, and if he does not

¹⁸ *Bank of Commerce v. Central C. & C. Co.* (1902), 115 Fed. 878, at 880.

¹⁹ *Bank of Commerce v. Central*

C. & C. Co. (1902), 115 Fed. 878, at 880.

²⁰ *Atlantic Trust Co. v. Chapman* (1907), 208 U. S. 375, 52 L. ed. 528, 28 S. C. Rep. 406.

obey such order, he may be in contempt. He is protected and privileged in carrying out such order of court. He does not pledge his individual property. He makes a statement to the other party to the engagement that the court pledges its faith that it will see that the engagement is carried out. This statement or the substance of it is contained in the order of court of which the party to the engagement, whether the holder of a receiver's certificate or otherwise, is held to have knowledge. The engagements of a receiver under order of the court are not entered into by authority or order of either party to the suit, therefore such parties can not be primarily liable for their payment.²¹ Neither can the expense ordinarily be charged to the plaintiff or defendant.²²

(b) Engagements of Receiver under Implied Power.^{22a} "A naked order of court requiring affirmative action of any kind by a receiver carries with it, by implication, the power to do whatever is reasonably necessary in the performances." ²³ If the power and authority to enter into engagements is undoubtedly implied in the order of court, the receiver must be entitled to the same protection as if it had been expressly and explicitly stated. But the receiver is the trustee of other people's property. He may apply to the court for instructions in doubtful cases at any time. If he is in doubt as to his power and authority as to engagements, he should apply to the court for instructions.²⁴

(c) Engagements of Receiver without Explicit or Implied Court Order. The engagements entered into by a receiver may not be directly or explicitly or under an undoubted implied power ordered by the court, yet may be within the scope of the receivership or under color of authority. He may make, as some

²¹ *Atlantic Trust Co. v. Chapman* (1907), 208 U. S. 378, 52 L. ed. 528; *McNulta v. Lochridge* (1891), 141 U. S. 327, at 332, 35 L. ed. 796.

²² *Atlantic Trust Co. v. Chapman* (1907), 208 U. S. 378, 52 L. ed. 528; *McNulta v. Lochridge* (1891), 141 U. S. 327, at 332, 35 L. ed. 796.

^{22a} See sec. 789 (b).

²³ *Haines v. Buckeye Wheel Co.* (1915), 224 Fed. 289, at 294.

²⁴ *In re Angell*, 131 Mich. 345, at 350, 351, 91 N. W. 611, at 612, cited with approval in *Haines v. Buckeye Wheel Co.* (1915), 224 Fed. 289, at 294.

courts say, subordinate or subsidiary contracts.^{24a} In the management of a great railway or other large undertaking by a receiver, the details of the management must necessarily be in the hands of the receiver and his subordinates. When the receiver makes an improvident contract or other engagement and the receivership can not carry it out and losses occur, is he personally liable? The English courts hold that the receiver makes such contracts himself individually and is personally liable, yet if such contracts are properly entered into and provident, the court will indemnify the receiver.²⁵ The American cases hold a receiver may not be personally liable on a contract he makes within the color of authority yet without implied authority when such contract is beneficial to the estate.²⁶ If losses occur, however, from such contracts the receiver may be personally liable.²⁷

(d) Engagements of Subordinates of Receiver. The subordinates of the receiver frequently enter into engagements within the scope of the receivership which are not directly or explicitly ordered by the court. If these engagements are not paid, who is liable thereon? On doctrines analogous to the doctrine that receivers are not responsible for the torts of their subordinates, receivers are held not to be responsible for or liable on the contracts entered into by their subordinates.²⁸

(e) Engagements of Receiver without Color of Authority. It is almost unnecessary to say that if the receiver goes outside

^{24a} Taylor v. Neate (1888), 39 Ch. D. 538, at 542.

²⁵ Burt Boulton & Hayward (1895), 1 Q. B. 276, at 284. See Iowa case, Peoria Steam Marble Works v. Hicky (1900), 110 Ia. 280, 81 N. W. 473. The Iowa court said the receiver, although he had authority to make purchases of stock, had no authority to execute a promissory note for the same; he had no principal against whom plaintiff might maintain an action, and unless he is bound no one is responsible. If the debt was properly incurred, he will be allowed the

amount paid out of his account; Plaintiff's right of action, if he had any, is on the receiver's promise. The Iowa decision is along the doctrine laid down by the English cases. See sec. 788. See also Rogers v. Wendell (1889), 54 Hun 540, at 546.

²⁶ Saving Bank Co. v. Fanning B. B. Chair Co., (1902), 118 Iowa 698, at 703, 92 N. W. 712.

²⁷ Haines v. Buckeye Wheel Co. (1915), 224 Fed. 289, at 295, cases cited.

²⁸ Kerr v. Little (1888), 39 N. J. E. 83, at 85.

of his court orders and outside of the scope of the receivership, and without color of his official title enters into engagements, he enters such engagements as an individual. This being the case, he must suffer the consequences as an individual,²⁹ and become liable on such contracts as an individual. If beneficial to the estate, he may be reimbursed if there are funds available, as any individual might be reimbursed. Yet a receiver, in handling other people's property, is a quasi-trustee and can not expect to make a profit.

§ 782. Receiver Protected when Obeying the Court's Order.

On the highest grounds of necessity and public policy judges can not be held liable for acts done by them in their judicial capacity.³⁰ It follows that courts managing property through a receiver can not be held liable as courts for any imperfect management.³¹ Executive officers of the courts, such as sheriffs, constables, receivers and other officers, who act in obedience to the lawful mandate of the court or in obedience to lawful process of any sort, are protected or privileged in respect to acts done under such lawful authority.³²

Receivers, like sheriffs or other court officers, may be guilty of contempt of court or liable to the parties injured if they do not obey the lawful orders of the court appointing them.³³ If the receiver, in obedience to the court's lawful orders, commits what without the court's orders would be a tort, it is not conceivable that such receiver would be liable for such act. It is also inconceivable that a receiver, when obeying the lawful orders of the court and the laws of the land, may be guilty of a breach of an engagement or contract which the court may make through its receiver.³⁴

²⁹ In re Erie Lumber Co. (1906), 150 Fed. 817, at 830; Wolf v. Loving (1908), 159 Fed. 91, at 93; Kane v. Smith (1880), 80 N. Y. 470.

³⁰ Foundations of Legal Liabilities, Street 1, p. 37.

³¹ Gardner v. L. C. & D. Ry. (1867), L. R. 2 Ch. App. C. 201, at 213.

³² Hill v. Bateman (1726), 2 Stra. 710; Lewis v. Riley (1851), 11 C. B. 434; Tarlton v. Fishel (1781), 2 Doug. 671. See Palmer v. Texas (1908), 212 U. S. 118, at 120, 53 L. ed. 435, 29 S. C. Rep. 230.

³³ Braseyer v. Maclean (1875), 6 L. R. P. C., 398, at 406.

³⁴ Atlantic Trust Co. v. Chapman (1907), 208 U. S. 375, 52 L. ed. 528;

A receiver obeying the orders of the court is not a guarantor of the correctness of the court's rulings.³⁵ Furthermore, when a receiver has paid out money or the fund in his hands in good faith and in obedience to the orders of the court appointing him, he can not be compelled to make restitution and he is not personally responsible.³⁶ If the court has jurisdiction of the parties and the subject-matter, yet commits a legal error in the disposition of the fund, the receiver because he is obliged to obey such an incorrect order is protected.³⁷

The mere reversing of an order because it is erroneous does not make the receiver who has acted pursuant to it a wrongdoer, even though the effect of the reversal is to require the person who has received the benefit of it to make restitution, if the court sees fit to require him to do so.³⁸

If on the other hand the court appointing the receiver has not jurisdiction of the parties or has not jurisdiction over the subject-matter, an order made on the receiver may be without warrant or authority of law, and the receiver when obeying such order may be liable.

§ 783. Official Liability of Receiver—American Doctrine.

The American cases involving the greatest amount of property wherein receivers have been appointed are railroad cases. A receiver running a railroad must make contracts either himself or through his agents. The same may be said about a receiver running any business involving activities of manufacturing or otherwise.³⁹

Walsh v. Raymond (1890), 58 Conn. 256, 20 Atl. 464. See the question of receiver's liability on contracts discussed at length in secs. 788 and 789.

³⁵ Reardon v. Youngquist (1914), 189 Ill. App. 3, at 12.

³⁶ Reardon v. Youngquist (1914), 189 Ill. App. 3, at 12; Willis v. Sharp (1891), 124 N. Y. 406, 26 N. E. 974; Matter of H. P. S. F. Assn. (1891), 129 N. Y. 288, 29 N. E. 323; How v. Jones (1882), 60 Iowa 70, 14 N. W. 193; Coe v. Patterson (1907), 106 N. Y. S. 659, at 664; Langley v. Warner, 3 N. Y. 327.

³⁷ Platt v. New York & Sea, etc. (1902), 170 N. Y. 451, at 458, 63 N. E. 532, cited in Reardon v. Youngquist (1914), 189 Ill. App. 3, at 12.

³⁸ Coe v. Patterson (1907), 106 N. Y. S. 659, at 664; Lester v. Lawyers Surety Co. (1900), 50 App. D. (N. Y.) 188, citing Lovett v. German Rep. Ch., 12 Barb. 67, at 183; Simpson v. Hornbeck, 3 Laws 53; Langley v. Warner, 3 N. Y. 327.

³⁹ Atlantic Trust Co. v. Chapman (1907), 208 U. S. 376, 52 L. ed. 528. See 25 L. R. A. (N.S.) 418.

Under such contracts or activities within the scope of the receivership, liabilities are incurred, and by imperfect management by the receiver or by his agents and servants injuries are inflicted. If the railroad company or owner of the undertaking were still running the business, the company or owner would, in these cases, be liable in tort or contract. Looking at the obligation from the standpoint of the injured party, he can see no difference, whether the original owner or the receiver is running the business.

The American courts at once recognized that the injured person had some rights against someone, or to put it differently, a right to be compensated from some property.

When the receiver runs a railroad or business, he engages his subordinates, he controls them, and controls the business. He is not the agent of the court, although he may be the agency.⁴⁰ He is not the agent of the parties to the suit,⁴¹ or of the lienholders, because he is not subject to their orders and control, but under the orders of the court.⁴² The receiver does not own the property, therefore he can not, like the owner, subject the property to lien and other obligations, although the sovereign power acting through the court and its receiver may subject the property to certain charges, etc., or to liens, to use the expression of some courts.

The English courts said in the matter of contracts of a receivership: "We will place the responsibility on the receiver because he is primarily liable, but we will indemnify him out of the assets in the estate for his liabilities properly incurred. If he improperly incurs liabilities, he may even become bankrupt."⁴³

The American courts were confronted with the argument that you could not get responsible men to act as receivers if you held them personally responsible for their management

⁴⁰ *McNulta v. Lochridge* (1891), 141 U. S. 327, 35 L. ed. 796.

⁴¹ *Atlantic Trust Co. v. Chapman* (1907), 208 U. S. 371, 52 L. ed. 528; *Burt, Boulton & Haywood* (1875), 1 Q. B. 279.

⁴² *Atlantic Trust Co. v. Chapman* (1907), 208 U. S. 371, 52 L. ed. 528.

⁴³ *In re London U. B., Ltd.* (1907), 2 Ch. D. 511.

of the railroads, that such men would not jeopardize their individual estates in such a manner, and many other arguments were presented not so much against the principles of law and equity holding the maker of a contract primarily liable for its fulfillment, as against the expediency of so holding receivers primarily liable for their contracts made as receivers.

The American courts conceived the idea of a receiver being responsible in his "official capacity," for his contracts, misfeasances, negligences and liabilities.⁴⁴ This is as much as saying that neither the receiver nor anyone else is liable for certain contracts the receiver or his subordinates make and certain injuries he or his subordinates inflict, but if a claim arises out of such contract or injury, the claimant has to make a claim against someone and to sue someone, so he may sue the receiver officially.

Holmes, J., then of the Massachusetts Supreme Court, in commenting upon the status of a receiver running a railroad and his liabilities, says: "The strongest ground for the plaintiff would be that a receiver is not a corporation sole, and that therefore his liability must be personal even if he is entitled to indemnity out of the funds in his hands, according to the general principle applied to trustees, executors and the like. But the decisions have gone very far in distinguishing between the receiver's official and personal liability. The universal practice of the courts, bold as it may seem in its origin, appears to us to be too well established to be departed from, especially in a case like the present where the receivers were appointed by the court of the United States and where the defendants were guilty of no act or omission which would

⁴⁴ *McNulta v. Lochridge* (1891), 141 U. S. 327, at 332, 35 L. ed. 796; *Gray v. Railway Co.* (1907), 156 Fed. 736; *Farmers L. & T. Co. v. Central R. R.* (1880), 7 Fed. 537; *Lyons v. Sampsell* (1912), 168 Ill. App. 542, at 544; *Texas & Pac. Ry. v. Cox* (1891), 145 U. S. 593, 36 L. ed. 829, 12 S. C. Rep. 905; *Smith v. Jones Lumber & Mercan-*

tile Co. (1912), 200 Fed. 647, at 650; *Kloefher v. Osborne* (1913), 177 Ill. App. 384, at 395; *McNulta v. Lochridge*, 137 Ill. 270, at 279, 27 N. E. 452; *Bartlett v. Cicero Light Co.*, 177 Ill. 68, 52 N. E. 339; *Avey v. Burnley* (1915), 167 Ky. 26, 179 S. W. 1050; *Betts v. Bisher* (1914), 213 Fed. 581; *Hanlon v. Smith* (1909), 175 Fed. 192, at 197.

have been a cause of action apart from their official relation to one of the plaintiffs.”⁴⁵ What a judgment against a receiver means and how it can be collected is another matter, and will be considered under the proper heading.

Judgment against Receiver Officially. Such judgment has not the full force and effect of an ordinary judgment. It can not be a lien against the receiver's own property, because the courts say the receiver is not personally liable. It can not, like an ordinary judgment, be a lien against the property in the hands of the receiver, because only by order of the appointing court can a lien, or speaking more accurately a charge, be acquired against property in custodia legis, neither can execution be sued out against such property.⁴⁶ In the last analysis such a judgment is little more than a judicial finding of justice and amount of the claim.

As to the payment of that judgment, the rules and usages of equity and the statutes and laws governing distribution of money in the hands of the receiver must govern, and since the court appointing the receiver has custody of the property, that court must finally determine how it will distribute that property.⁴⁷ The claim against the receiver may be paid and it may not. Such judgment is not one in rem like a libel against a boat; it is a judgment in personam against the receiver as receiver, for courts of equity act in personam. As yet the principles of admiralty jurisdiction making a boat liable in rem have not been applied to receivership, although our supreme court in *Atlantic Trust Co. v. Chapman* seems to lean toward that practice when the court says the liabilities which the receiver incurs are chargeable upon the property

⁴⁵ *Archambeau v. Platt* (1899), 173 Mass. 249, 53 N. E. 816.

⁴⁶ *Hills v. Parker* (1873), 111 Mass. 510; *Wiswall v. Sampson* (1850), 14 How. 52, 14 L. E. 322; *Russell v. Railway Co.* (1850), 3 MacN. & G. 104; *Noe v. Gibson* (1839), 7 Paige 513; *Coe v. Patterson* (1907), 106 N. Y. S. 659, at 664.

⁴⁷ *Attorney General v. Supreme Council A. L. H.* (1907), 196 Mass. 151, 81 N. E. 966, at 967; *Lyons v. Sampsell* (1912), 168 Ill. App. 542, at 544; *Malott v. Mapes* (1903), 111 Ill. App. 340; *Gableman v. Peoria, etc., Ry.* (1900), 179 U. S. 335, at 342, 45 L. ed. 220; *Betts v. Bisher* (1914), 213 Fed. 581, at 583.

under the control and in the possession of the court and are not liabilities of the parties.⁴⁸

§ 784. Liability of Receiver for His Own Torts—English Doctrine. On the highest grounds of necessity and public policy, judges can not be held liable for acts done by them in their judicial capacity,⁴⁹ and executive officers of the court who act in obedience to the lawful mandate of the court of justice or in obedience to lawful orders of any sort, are protected or privileged in respect to acts done under such lawful authority.⁵⁰

Receivers are officers of the court and have the protection of the court restraining persons from bringing suits against them in respect to their receivership except where leave is given by the court which appoints them⁵¹ or statutory leave is given.

It therefore must follow that they can not be sued for acts which they do in obedience to the orders of the court appointing them or of the laws of the sovereignty.

If receivers acting within the scope of the receivership and under color of authority disobey any laws and commit a tort or other unlawful act, then they must be liable for damages as any individual would be, except for the fact that the statutory laws of England expressly provide certain protection to such persons as receivers by "an act to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties." 5 Dec. 1893.⁵² Sec. 1 of said act provides: "Where, after the commencement of this act, any action, prosecution or other proceeding is commenced in the United Kingdom against any person for an act done in pursuance or execution or intended execution of any act of parliament, or of any

⁴⁸ *Atlantic Trust Co. v. Chapman* (1907), 208 U. S. 375, 52 L. ed. 528.

⁴⁹ *Foundation of Legal Liability*, Street 1, p. 37.

⁵⁰ *Foundation of Legal Liability*,

Street 1, p. 38; *Brasyer v. Maclean* (1875), 6 L. R. P. C. 398, 406.

⁵¹ *Searle v. Choate* (1884), C. A. 25 Ch. D. 723.

⁵² (1893), 56 and 57 Vic., ch. 61.

public duty or authority, or in respect of any alleged neglect in default in the execution of any such act, duty or authority, the following provisions shall have effect.⁵³

It was formerly held that, "If the misconduct of an officer of the court in executing its orders becomes the subject of civil proceedings before another tribunal, the court in its discretion may either itself take cognizance of the complaint or may leave the matter to be dealt with upon such proceedings, but wherever the title to redress against such officer is provided on a denial of his authority or an alleged defect in the order which he has executed, the court (which alone is competent to decide upon the validity of its own orders) is bound to interfere by injunction and assume exclusive jurisdiction over the matter of complainant."⁵⁴

Since the passage of the English Judicature Act⁵⁵ the proper course for one who is wronged by a receiver even doing wrong and committing an act beyond the scope of his authority, although he may be liable as an individual nevertheless, is to make application to the appointing court, because the whole tenor of the Judicature Act is to require all proceedings as far as possible to be taken in one action.⁵⁶

§ 785. Liability of Receiver for His Own Torts—American Doctrine. . The law laid down very generally in America is that the misfeasances, negligences and liabilities of a receiver are official and not personal.⁵⁷

Some of the exceptions to this general rule may be noted as follows: "A receiver may frequently, under color of office, get possession of property which does not belong to him, and his official character will not be a defense to this tortious

⁵³ (1893), 56 and 57 Vic., ch. 61.

⁵⁴ *Aston v. Heron* (1834), 2 M. & K. 390; *Chalie v. Pickering* (1836), 2 Keene 749.

⁵⁵ Judicature Act of 1873, sec. 24, subsec. 5.

⁵⁶ *Searle v. Choat* (1884), 25 Ch. D. 723, at 727.

⁵⁷ *McNulta v. Lochridge* (1891), 141 U. S. 327, 35 L. ed. 796; *Erb v. Morasch* (1900), 177 U. S. 584, 44 L. ed. 897; *Farmers L. & T. Co. v. Central R. R.* (1880), 7 Fed. 537; *Texas & Pac. Ry. v. Cox*, 145 U. S. 593, 36 L. ed. 829. See further cases under sec. 780, *supra*.

action or deprive the parties of their legal rights.⁵⁸ He may be and probably should be sued individually without title for such a tort but his title in such a case may be simply descriptive. If a receiver acts beyond the scope of his receivership he, of course, does not act as a receiver and the protection usually accorded receivers does not extend to such acts."⁵⁹ A judgment as receiver in such a case in no way interferes with or affects the funds or property in the custody of the court through its receiver.⁶⁰

"The decree of a court of chancery appointing a receiver entitles him to its protection only in the possession of property which he is authorized or directed by the decree to take possession of. When he assumes to take hold of property not embraced in the decree appointing him, and to which the debtor never had any title, he is not acting as an officer or representative of the court of chancery but is a mere trespasser, and the rightful owner of the property may sue him in any appropriate form of action for damages or to recover possession of the property illegally taken or detained."⁶¹

Where the receiver has taken possession of property not rightfully belonging to his trust in an administrative capacity, whether as United States marshal, sheriff, administrator or otherwise, he is personally responsible for the trespass committed.⁶² But if one court has made an improvident order and the receiver is acting innocently under positive orders from that appointing court, what is to be done? The federal court⁶³

⁵⁸ *Gutsch v. McIlhargey* (1888), 69 Mich. 378, 37 N. W. 303.

⁵⁹ *Keene v. Gaehle* (1881), 56 Md. 343; *Kirk v. Kane* (1900), 87 Mo. App. 279. The Supreme Court of North Carolina has held in *State v. Norfolk & Southern Ry. Co.* (1910), 152 N. C. 785, 67 S. E. 42, that receivers of a railway corporation may be indicted individually for having committed a nuisance by willfully allowing their cars to remain in the public road for more than one or two hours, thereby obstructing the road.

⁶⁰ *Kirk v. Kane* (1900), 87 Mo. App. 280.

⁶¹ *Parker v. Browning* (1840), 8 Paige 388; 1 Paige v. Smith (1868), 99 Mass. 395; *Hill v. Parker* (1873), 111 Mass. 508, at 511.

⁶² *Curran v. Craig* (1884), 22 Fed. 101, at 102. See also *Searle v. Choate* (1884), C. A. 25 Ch. D. 723.

⁶³ *Curran v. Craig* (1884), 22 Fed. 101, at 102. See also *Searle v. Choate* (1884), C. A. 25 Ch. D. 723.

suggests that the plaintiffs who feel aggrieved by the receiver's actions make application to the appointing court for a modification of its order. Thus an unseemly conflict between courts can be avoided, and the rights of the respective parties preserved.⁶⁴

Under the Tennessee statutes as they existed in 1871, a receiver of a railroad was appointed by the governor of the state. He was the agent of the state. The court of Tennessee said that such a receiver, when he had knowledge of a material defect in the machinery and equipment of a train and with this knowledge was running the train when an accident occurred, and when the accident was the result of this defect in the machinery and equipment of the train, the receiver was guilty of a misfeasance, but would not be responsible for a nonfeasance. Note in this case the receiver was an agent of the state.⁶⁵

When a receiver goes into possession or control of a railroad or other business which is not directly in the court's possession, what are his liabilities as to torts which are committed in the management of that railroad or other business? If the receiver goes into possession of a railroad or other property not by direction of the court but by permission of that court, and the court has no authority over the second railroad by reason of its being outside of the state or for any other reason, then the receiver can not be shielded by a description of his office or a declaration that he is acting in an official capacity, but is personally liable for his own negligence, whether he acts personally or through agents, alone or in company with others.⁶⁶

§ 786. Liability of Receiver for His Subordinate's Torts—English Doctrine. Receivers occupy the position of quasi

⁶⁴ *Curran v. Craig* (1884), 22 Fed. 101, at 102. See also *Searle v. Choate* (1884), C. A. 25 Ch. D. 723.

⁶⁵ *Erwin v. Davenport* (1871), 9 Heisk. 44.

⁶⁶ *Kane v. Smith* (1880), 80 N. Y. 458, at 471.

trustees under the appointment of court.⁶⁷ The English courts hold that the propriety of a trustee employing an agent being once established, the trustee should be exonerated from loss unless guilty of wilful default.⁶⁸ A trustee is bound to exercise discretion in the choice of his agents, but so long as he selects persons properly qualified he can not be made responsible for their intelligence or their honesty. He does not in any sense guarantee the performance of their duties.⁶⁹ No cases are found in the English reports or the textbooks wherein receivers have been held individually liable for the torts committed by their agents or servants when their agents or servants were properly appointed. It would seem that receivers, being quasi-trustees,⁷⁰ are protected by the general law governing trustees and such other acts on the subject.

Receivers are also protected as receivers by the usages and rules of equity, which do not permit a suit to be brought against a receiver in respect to his receivership.

§ 787. Liability of Receiver Officially for His Subordinate's Torts—American Doctrine. The American courts of highest authority hold that, "No receiver could be made individually liable in a personal action upon a contract made in his official capacity, or for torts committed by his subordinates,"⁷¹ and actions against the receiver are in law actions against the receivership, and his contracts, misfeasances, negligences and liabilities are official and not personal."⁷²

The first case of any importance wherein the liability of a receiver for the negligence of his servants in losing goods in transit was *Blumenthal v. Brainard*.⁷³ In that case the court

⁶⁷ *Bevan on Negligence*, 3d Ed., Vol. 2, p. 1266.

⁶⁸ *Bevan on Negligence*, 3d Ed., Vol. 2, p. 1234.

⁶⁹ *In re Weall*, *Andrews v. Weall* (1889), 42 Ch. D. 678.

⁷⁰ *Bevan on Negligence*, 3d Ed., Vol. 2, p. 1266; 56 and 57 Vic., C. 53, S. S. 1-9.

⁷¹ *Farmers L. & T. Co. v. Central R. R.* (1880), 7 Fed. 537; *McNulta*

v. Lochridge (1891), 137 Ill. 270, 27 N. E. 452.

⁷² *McNulta v. Lochridge* (1891), 141 U. S. 327, 35 L. ed. 796; *Erb v. Morasch* (1900), 177 U. S. 584, 44 L. ed. 897, 20 S. C. Rep. 819. See *Davis v. Duncan* (1884), 19 Fed. 477; *Texas & Pac. Ry. v. Cox* (1891), 145 U. S. 593, at 597, 36 L. ed. 829, 12 S. C. Rep. 905.

⁷³ *Blumenthal v. Brainard* (1866), 38 Vt. 401.

said: "The mere fact that the defendants were acting as receivers under the appointment of the court of chancery can not be recognized as a defense to a suit at law for a breach of any obligation or duty which was fairly and voluntarily assumed by them in matters of business conducted or carried on by them while acting as such receivers. As between a receiver and the parties interested in the trust the receiver would be responsible for negligence, but he might be liable to other parties in a larger or stricter degree of responsibility." ⁷⁴

"The assumption by the receiver of the peculiar duties and extraordinary responsibilities arising from the relation of common carrier is not to be considered as necessarily, if at all, incompatible with any duty or responsibility imposed upon them as receivers. If in fact they were common carriers over that line of railroad, we think that it is no defense to an action at law, for a breach of a duty, or obligation arising out of business entrusted to them in that relation that they were running and managing the line of railroad as receivers under the appointment of the court of chancery." ⁷⁵

In spite of the well-known principles of law analogous to the case that neither a public official nor a trustee can be responsible for the torts of his agents or servants properly appointed, the Vermont court held the receiver liable in his individual capacity for the torts of his servants.

The next leading case on this subject in America was in 1870 before the Supreme Court of Ohio.⁷⁶ A receiver as such was sued for injuries sustained from the defectively constructed coupling bar, or to put it as does the syllabus of the case, or through the negligent discharge of his duties by himself or his agents. The Ohio statutes ⁷⁷ permitted a receiver under the control of the court to bring and defend actions in

⁷⁴ *Blumenthal v. Brainard* (1866),
38 Vt. 401.

⁷⁵ *Blumenthal v. Brainard* (1866),
38 Vt. 402.

⁷⁶ *Meara v. Holbrook* (1870), 20
O. S. 137.

⁷⁷ Ohio General Code of 1851, sec.
256.

his own name as receiver, and yet no liability was alleged or claimed against the receiver, and no personal judgment was demanded.

The court said in the Ohio case, "If a receiver could be held responsible in his individual capacity as was held in *Blumenthal v. Brainard*,⁷⁸ indeed, the reasons for holding him answerable in his official capacity are stronger than those for holding him personally liable," and held the receiver officially liable.⁷⁹

Following the Ohio case in point of time came the New York case of *Cardot v. Barney*.⁸⁰ Judge Allen, of the New York Supreme Court, reached the same conclusion as did the Ohio Supreme Court in the *Meara* case, but we believe on more satisfying reasoning. He said among other things: "His (the receiver's) relation to the road and its operation was entirely official and he had no interest in or control over the earnings and was removable at the pleasure of the court. He was powerless to protect himself against the hazard of the acts of those he was compelled to employ. His position was analogous to that of a public official charged with public duties, in the performance of which he is compelled to act in part by others. It is a great hardship, in such cases, to impose upon them the hazards and responsibilities which attach to individuals acting by agents appointed for their own convenience and profit. It would be different if the defendant had sought to do by others that which he was expected and competent to do in person. But such was not the case. The employment of agents was a necessity, and expressly directed by the court; and if in the performance of this part of his duty, he was prudent and selected only competent agents, he had discharged his full duty, and ought not to be held to guarantee the acts of the agents employed."⁸¹

⁷⁸ *Blumenthal v. Brainard* (1866), 38 Vt. 402.

⁷⁹ *Meara v. Holbrook* (1870), 20 O. S. 148.

⁸⁰ *Cardot v. Barney* (1875), 63 N. Y. 287.

⁸¹ *Cardot v. Barney* (1875), 63 N. Y. 286.

The American courts have absolved the receiver personally and placed the responsibility for imperfect management on the res as best they can. A judgment against the receiver as such has not the full force of an ordinary judgment because execution can not be taken out on it, neither is it ordinarily a lien against the property, for no lien can be acquired against such property in the hands of a receiver, against the court's order.⁸²

Such a judgment is a claim which may be allowed or not by the appointing court and be given such priority as the appointing court shall adjudge to be proper.⁸³

§ 788. Liability of Receiver for His Contracts—English Doctrine. Before the case of *Burt, Boulton & Hayward v. Bull*,⁸⁴ decided by the English High Court of Justice sitting in appeal cases in 1895, it happened that "there is little or no authority on the subject of the liability of receivers on contracts entered into by such receivers." The reason stated for this lack of decision in the matter seems to be that it had always been supposed that the law was well settled in England that in the case of receivers and managers appointed by the court "the intention is that the receiver and manager so appointed should appear to the world as the person carrying on the business in the usual way, making himself personally liable on all contracts except in cases where there might be a special stipulation to the contrary and looking for indemnity to the assets or the persons for whose benefit ultimately the business was carried on." Since the *Bull* case a number of cases on the

⁸² The Supreme Court of North Carolina, in *State v. Railroad* (1910), 152 N. C. 785, at 789, 67 S. E. 42, has held that receivers of a railway may be indicted individually for having by their servants or agents operated the railway and wilfully allowed the cars to remain in the public road for one or two hours at a time, thereby

obstructing the road. Since all the court had to decide was that the railway company itself was not indictable, therefore this decision as stated above may be said to be obiter dictum.

⁸³ In *re Wrexham, etc.* (1900), 11 Ch. D. 443.

⁸⁴ *Burt, Boulton & Hayward v. Bull* (1895), 1 Q. B. 276, at 284.

subject⁸⁵ have come to the highest courts of England for review, and the above doctrine has been maintained and applied to the various phases of the subject presented.

The English doctrine of receivers being individually liable on contracts is more particularly stated as follows: A manager and receiver must have power to enter into new contracts for the purposes of carrying on the business. The manager or receiver must enter into some contracts for the purpose of performing what for the sake of distinction may be called the principal contract, that is, the preservation of the assets in the hands of the receiver. The receiver must, for instance, employ workmen and pay wages, and if they happen to be leaving the business, he may have to get other workmen. The management of the business involves entering into contracts. These contracts may be said to be subordinate contracts.⁸⁶ His authority to carry on the business is given to him by the court which is the arm of the sovereign power of the state which has taken away the right to carry on the business from the corporation or individual by a proceeding in personam against that corporation or individual. "You carry on that business," says the court to the receiver, "much the same as in certain cases a court says to an administrator, 'You carry on the business and carry out the contracts of the deceased.'"⁸⁷ "If you enter into contracts, I, the court, will not be responsible because I am the arm of the sovereign power. You are not my agent, but my officer. The parties to the receivership suit did not appoint you, and they do not control you, at least, directly, so they are not responsible for your actions and contracts. You have not even the complete management of the property. I, the court, have the management. You are my officer to carry out certain details

⁸⁵ *British Power T. & L. Co.* (1906), 1 Ch. D. 497; *British Power T. & L. Co.* (1910), 2 Ch. D. 470, 79 L. J. 666; *British Power T. & L. Co.* (1907), 2 Ch. D. 511; *In re Gladsir Mines* (1906), 1 Ch. 365, at 378; *Boehm v. Goodall* (1911), 1

Ch. 155; *Moss S. S. Co., Ltd.* (1912), A. C. 254.

⁸⁶ *Taylor v. Neate* (1888), 39 Ch. 538, at 542.

⁸⁷ *Burt, Boulton & Hayward v. Bull* (1895), 1 Q. B. 276.

according to my orders and according to law. You can not contract in any other name but your own name. If you obey my orders and obey the law and make contracts in your name as receiver and incur obligations, this court will indemnify you.”⁸⁸

“The incidents of his relation to the court are such as would, if they existed as between him and an ordinary person, constitute him an agent for such person, but it is, of course, impossible to suppose that the relation of agent and principal exists between him and the court. What is the inference that necessarily arises? It would be that the intention is that he shall act in pursuance of his appointment in his own responsibility and not as agent, because otherwise nobody will be responsible for his acts. The company can not be liable, for he is not their agent and the court clearly can not be liable. Therefore any orders which he may give under such circumstances as manager must *prima facie* be taken to be orders given on his own responsibility and credit.”⁸⁹

“As soon as it appears that he has no principal and is a receiver appointed by the court, it is implied, I think, when he enters into a contract that it is a real contract, by which he binds himself personally, and he must look for indemnity for the liability so incurred to the assets.”⁹⁰

Carrying the English doctrine of a receiver's contracts being his own to its logical conclusion, we find a recent case where a receiver incurred liabilities without leave of court or the consent of the defendant, and failing to discharge all of these liabilities, he subsequently became bankrupt.⁹¹

Yet “where the court has appointed a receiver who has incurred liabilities in the proper management of the estate which was given to him to manage, the court will see that those creditors are satisfied either by the receiver or in case the receiver should become bankrupt or there should be any other

⁸⁸ *Burt, Boulton & Hayward v. Bull* (1895), 1 Q. B. 276, at 284.

⁸⁹ *Burt, Boulton & Hayward v. Bull*, Lord Esher M. R. (1895), C. A. 1 Q. B. 276, at 279.

⁹⁰ *Rigby, J., in Burt, Boulton & Hayward v. Bull* (1895), 1 Q. B. 276, at 284.

⁹¹ *Boehm v. Goodall* (1911), 1 Ch. D. 155, at 161.

reason making it advisable, by payment direct to the creditors out of the funds in court.”⁹²

It was urged in some of the English cases that it was very hard to make receivers and managers personally liable.⁹³ The answer was that receivers have ample opportunity of protecting themselves if they take the proper course. If they find that they have no funds to meet orders they need not give them, or if they give orders they may give them in such a form and on such terms as to exclude personal liability on their part.

In reply to the suggestions that one dealing with the receiver must look alone to the funds in hands or other assets of the concern, Lord Esher said, “The consequences of this view (namely, that the tradesmen must look solely to the fund or assets) appear to me to be so serious that no court having regard to the exigencies of business would accept it, unless it were absolutely obliged to do so by authority; for the result would be that no tradesman could safely deal with such a manager without inquiring as to the existence of a fund to which he might look, whether if such a fund existed, it was not subject to other liabilities and whether the business was being carried on by the manager at a profit, and the same thing might apply to the servants employed in the business.”⁹⁴

The enforcement of the English doctrine of a receiver’s contracts being his own seems to work satisfactorily in England. The cases reported wherein a receiver has become bankrupt⁹⁵ or wherein the court has refused to indemnify him, are cases wherein he improperly entered into contracts or improperly exceeded the court’s orders.

It may be suggested that in the case of a receiver of a railroad and other public utilities, the receiver is obliged to enter into contracts by law and many contracts are made by his

⁹² London United Breweries, Ltd. (1907), 11 Ch. D. 511, at 515. See Matter of Trade Creditors and matters discussed. British Power Traction Co. (1910), 11 Ch. D. 470, 79 L. J. C. 666.

⁹³ Burt, Boulton & Hayward v. Bull (1895), 1 Q. B. 276, at 282.

⁹⁴ Burt, Boulton & Hayward v. Bull (1895), 1 Q. B. 276, at 281.

⁹⁵ London United Breweries, Ltd. (1907), 11 Ch. D. 511.

subordinates, and therefore, the English doctrine is particularly not fair when a receiver manages large active properties. In reply it must be noted that in 1867 the English Chancery court⁹⁶ refused to appoint a receiver for a railroad, but in 1867 the English Parliament passed an act permitting a chancery court to appoint a receiver of a railway and providing that "all money received by such receiver or manager shall after due provision for the working expenses of the railway and other proper outgoings in respect to the undertaking be applied and distributed under the direction of the court."⁹⁷ There is little or no litigation found in the English reports concerning the contracts of a receiver of a railroad.

§ 789. Liability of Receiver for His Contracts—American Doctrine.^{97a} The American courts start out with the proposition that the court appointing a receiver has power to order its receiver to make contracts relative to the business or property in the receiver's hands or to ratify contracts which the receiver makes.⁹⁸ "Parties dealing with the receiver must be presumed to know that the receiver could make no contract effectual against the trust which was not first authorized or subsequently ratified by the chancellor."⁹⁹ Whatever is not so authorized or ratified can not be charged against the trust.

The American doctrine as expressed above and carried no farther is very simple and satisfying. "It puts upon the chancellor the responsible and delicate duty of finally passing upon all outlays and deciding whether they are necessary, proper and judicious and should be allowed or not."¹

The law in America covering the liability of receivers, however, has gone much farther than as just above indicated, and

⁹⁶ *Gardner v. L. C. & D. Ry.* (1867), L. R. 2d App. Cases, 201, at 213 A. C.

⁹⁷ *Railway Companies Act of 1897.* See *In re Wrexham, etc.* (1900), 11 Ch. 440.

^{97a} See sec. 781, *supra*.

⁹⁸ *Mooney v. British Commercial L. J. Co.* (1870), 9 Abb. Pr. (N.Y.) 105.

⁹⁹ *Lehigh, C. & N. Co. v. Central R. R.* (1882), 35 N. J. E. 426; *Chicago Deposit Vault Co. v. McNulta* (1893), 153 U. S. 562, 38 L. ed. 819, 14 S. C. Rep. 915. See *Crawford v. Gordon* (1915), 88 Wash. 553, 153 Pac. (Wash.) 363.

¹ *Lehigh, C. & N. Co. v. Central R. R.* (1882), 35 N. J. Eq. 429.

has been very broadly stated by Mr. Justice Brown in *McNulta v. Lochridge* as follows: "Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences and liabilities are official and not personal, and judgments against him as receiver are payable only from the funds in his hands."²

This broad statement of Mr. Justice Brown was made in a case involving not a contract of the receiver, but a tort committed by one of the subordinates of the predecessor of the receiver of a railway. What the court therefore says as to the contracts of a receiver may be said to be to a large degree obiter dictum. Nevertheless this has become the law in America, if we will place the proper limitations and explanations on the words of Mr. Justice Brown. Most of these limitations and explanations are indicated in the following observations:

(a) Contracts Expressly Authorized. When a receiver is appointed of a large railway, other public utility, or active business, it is frequently necessary for someone to borrow large amounts of money or enter into large and important engagements involving the life of the property in the receiver's hands. Before such engagements are entered into, notice should be given to all parties and a full hearing had before the court. If the court has lawful authority to make an order on the receiver to enter into such engagements or contracts, then the receiver must be and undoubtedly is properly and adequately protected.³ In such cases the receiver does not make the engagements or contracts in his individual capacity. What the court does in such a case is to pledge its own faith to the lenders of money or other parties to the engagement

² *McNulta v. Lochridge* (1891), 141 U. S. 327, at 332, 35 L. ed. 796, 12 S. C. Rep. 11. See *Erb v. Monaseh* (1900), 177 U. S. 584, 44 L. ed. 897, 20 S. C. Rep. 819. See *Davis v. Duncan*, 19 Fed. 597; *Texas & Pac. Ry. v. Cox* (1891), 145 U. S. 597, 36 L. ed. 829, 12 S. C. Rep. 905; *Archambeau v. Platt*

(1899), 173 Mass. 249, 53 N. E. 816; *Atlantic Trust Co. v. Chapman* (1907), 208 U. S. 375, 52 L. ed. 528, 28 S. C. Rep. 406; *Vanderbilt v. Central R. R. Co.* (1887), 43 N. J. E. 669, at 684, 12 Atl. 188.
³ *Haines v. Buckeye Wheel Co.* (1915), 224 Fed. 289.

or transaction that it will enforce the payment of the money or act or acts promised.⁴

In some cases the court says it will make the payment of the money borrowed a charge or lien against the property in its possession, and that such payment shall be made as a condition of the court releasing the property and of its enforcing any equity in favor of those who invoke the court's assistance.⁵ The Supreme Court of the United States has recently said: "The contracts he (the receiver) makes or the engagements into which he enters from time to time under the order of the court are in a substantial sense the contracts and engagements of the court."⁶ To say that the court in a substantial sense enters into a contract is to say that it does not in the full sense of the word enter into a contract. A court can not assume the liabilities for the carrying out of the breach of a contract which ordinarily fall on the parties to a contract. "If a receiver acts within his authority the receivership property is in effect pledged for the payment of the debt."⁷ Under such circumstances the receiver in his capacity as an officer of the court signs a receiver's certificate or enters into other engagements in writing or not in writing. Such an engagement is a meeting of the minds and there is consideration for the same. The receiver simply obeys the orders of court.

Hall, J., of Connecticut, in 1889,⁸ says concerning the liability on such contracts as follows: "We do not mean, however, to be understood as holding a receiver while acting as such can not make himself personally liable on his contracts or otherwise, but simply that he will be protected so long as he acts strictly under orders of the court appointing him."

"When he is in doubt as to what he ought to do, he should take the advice of the court."⁹ "By so doing he can at all

⁴ *Bank of Com. v. Central C. & C. Co.* (1902), 115 Fed. 878, at 880; *Kirker v. Owings* (1889), 98 Fed. 499.

⁵ *Taft, J., in Mercantile Trust Co. v. Kanawha* (1893), 58 Fed. 6.

⁶ *Atlantic Trust Co. v. Chapman*

(1907), 208 U. S. 375, 52 L. ed. 528, 28 S. C. Rep. 406.

⁷ *Haines v. Buckeye Wheel Co* (1915), 224 Fed. 289.

⁸ *Walsh v. Raymond* (1889), 58 Conn. 251, 20 Atl. 464.

⁹ *In re Angell* (1902), 131 Mich. 345, at 351, 91 N. W. 611.

times protect himself, and if he neglects or refuses to avail himself of the ample and effective shield which the law thus provides and places in his hands, he acts upon his own responsibility and at his own risk and peril.”¹⁰

(b) Contracts under Implied Power.^{10a} “A naked order of court requiring affirmative action of any kind by a receiver carries with it, by implication, the power to do whatever is reasonably necessary in its performance.”¹¹ If the receiver enters into the engagement under direct authorization of the court, or under an undoubted implied power to do it, then he himself as an individual does not make any contract at all; he simply as an officer of the court pledges the faith of the court to carry out such engagement.¹²

In a plainly doubtful case involving transactions of magnitude and not matters of minor detail, authority to act can not be predicated upon mere inference or uncertain implications, because in such case, it is not only the right but the duty of the receiver to inform the court fully as to the facts and to ask for instructions.¹³

And yet said Ladd, C. J., of Iowa, “Not every act within the letter of an order can be sanctioned nor everything done without the direction of the court condemned. The tests to be applied are:

“First. Was the act under investigation within the authority conferred by an order of court?

“Second. If so, was it performed with reference to the preservation of the estate, as a man of ordinary sagacity and prudence would have performed it under like circumstances?

¹⁰ Haines v. Buckeye Wheel Co. (1915), 224 Fed. 289; In re Angell (1902), 131 Mich. 345, at 350, 351, 91 S. W. 611.

^{10a} See Engagements of Receiver under Implied Power. Sec. 781(b).

¹¹ Haines v. Buckeye Wheel Co. (1915), 224 Fed. 289. See Hillsborough Grocery Co. v. Ingalls (1910), 60 Fla. 105, at 108, 53 So.

930, and cases there cited.

¹² Haines v. Buckeye Wheel Co. (1915), 224 Fed. 289; Cake v. Mohun (1896), 164 U. S. 311, 41 L. ed. 447, 17 S. C. Rep. 100; Hillsborough Grocery Co. v. Ingalls (1910), 60 Fla. 105, at 108, 53 So. 930.

¹³ Haines v. Buckeye Wheel Co. (1915), 224 Fed. 289.

“Third. If without authority, was it beneficial to the estate?”¹⁴

(c) **Contracts without Explicit or Implied Power.** See sec. 781 (c), this chapter, subject, “Engagements of Receiver without Explicit or Implied Power.”

(d) **Contracts of Subordinates of Receiver.** See sec. 781 (d), this chapter, subject, “Engagements of Subordinates of Receiver.”

(e) **Contracts of Receiver without Color of Authority.** See sec. 781 (e), this chapter, subject, “Engagements of Receiver without Color of Authority.”

(f) **Subsidiary Contracts of Receivership.** When a receiver himself, even though acting under color of his office as receiver yet without going to the court for orders or instructions, makes what may be termed subsidiary contracts¹⁵ or contracts incidental to the running of a large business, what are the liabilities under such contracts?

A receiver is not the agent of the court,¹⁶ neither is he the agent of the parties to the suit,¹⁷ so he can not, when acting within the scope of the receivership and under color of his office, hold the court or the parties to the suit liable on the doctrine of agency.¹⁸ Unless he is acting under the express or implied power given him by the appointing court, he has not the right to call upon the court for protection from liability. If he acts outside of the express or implied power given him he is not acting as receiver, but he acts as an individual.¹⁹

If a receiver goes beyond his authority express or implied, and is guilty of a breach of contract, none of the creditors

¹⁴ *Savings Bank v. Ball-Bearing Chain Co.* (1902), 118 Iowa 698, at 703, 92 S. W. 712.

¹⁵ See *Taylor v. Neate* (1888), 39 Ch. D. 538, at 545; *Rogers v. Wendell* (1889), 54 Hun 540.

¹⁶ *McNulta v. Lochridge* (1891), 141 U. S. 327, 35 L. ed. 796, 12 S. C. Rep. 11.

¹⁷ *Atlantic Trust Co. v. Chapman*

(1907), 208 U. S. 375, 52 L. ed. 528, 28 S. C. Rep. 406.

¹⁸ *Atlantic Trust Co. v. Chapman* (1907), 208 U. S. 375, 52 L. ed. 528, 28 S. C. Rep. 406.

¹⁹ *Savings Bank v. Ball-Bearing Chain Co.* (1902), 118 Iowa 689, 92 N. W. 712; *Allen v. Kittrell* (1914), Tex. Civ. App., 162 S. W. 397; also *I. & G. N. v. Herndon*, 11 Tex. C. A. 465.

having an interest in the fund are responsible for it. The receiver, being *sui juris*, is personally responsible for any wrong *ex contractu* or *ex delicto* which he may have committed.²⁰

If losses occur to merchants or others by reason of the contracts or debts of a receiver in excess or outside of the authority of the receiver, they may bring action against the receiver, and on his bond to redress such wrongs or injuries;²¹ but they are not confined to that remedy. They also have the undoubted right to intervene in the case wherein the receiver was appointed and to pursue their remedy in the court whose officer by his unauthorized acts has created the losses which they have sustained.²² Even if the receiver has been discharged, he is still accountable to the court of his appointment, not only for his authorized acts but for whatever he has done in the name of the court and under color of his office, although outside the scope of his authority.²³

If the receiver creates an indebtedness or otherwise contracts he may not injure the trust estate financially, nevertheless, unless it is shown that by so doing he has not injured the creditors of the receivership or his own creditors, then it can not be said that damages have not followed his contracts beyond the scope of his authority. In such a case the receiver personally may be compelled to pay such contracts or such indebtedness made beyond and without his authority.²⁴

If the receiver has entered into contracts and engagements beyond the scope of his authority and profits have ensued, none the less he has created this indebtedness without authority and is not primarily without liability.²⁵ Nevertheless, as any-

²⁰ *In re Erie Lumber Co.* (1906), 150 Fed. 817, at 830. See *Rogers v. Wendell* (1889), 54 Hun 540, at 546, 7 N. Y. Supp. 781, 8 N. Y. Supp. 515.

²¹ *In re Erie Lumber Co.* (1906), 150 Fed. 817, at 826; *Haines v. Buckeye Wheel Co.* (1915), 224 Fed. 289, at 297.

²² *In re Erie Lumber Co.* (1906), 150 Fed. 817, at 830.

²³ *Haines v. Buckeye Wheel Co.* (1915), 224 Fed. 289, at 297.

²⁴ *In re Erie Lumber Co.* (1906), 150 Fed. 817, at 830; *Savings Bank v. Ball-Bearing Chain Co.* (1902), 118 Iowa 698, at 707, 92 N. W. 712.

²⁵ See *Wolf v. Lovering* (1908), 159 Fed. 91, at 93.

one else, if he benefits the estate, and neither causes the estate nor the receivership creditors any loss, he himself should not suffer any loss. On the other hand, being a trustee or quasi-trustee and being given a compensation for his work, he should not be allowed profit out of his undertakings or speculations with trust property.

The question whether a receiver has contracted bills as receiver or has assumed a personal liability thereon is one to be determined from the facts and circumstances of the case.²⁶

(g) Rule as to Receiver's Liability on Promissory Notes. It was held by the Supreme Court of Massachusetts in 1877, that a receiver making a promissory note and signing it by his name "receiver," bound himself personally that the word "receiver" was a mere descriptio personae.²⁷ A promissory note is primarily a contract to pay money, therefore the question whether or not the maker signing himself receiver is personally bound or not depends upon whether or not the courts distinguish between the receiver's official and personal liability. In 1899 Justice Holmes, then of the Supreme Court of Massachusetts, reluctantly admitted that the official liability doctrine obtains in Massachusetts.²⁸

It was held by the Court of Appeals of Maryland that a purchaser of notes of a corporation signed by Edgar Zielian, receiver, took them with constructive notice of the receiver's want of authority to issue them, and therefore the corporation was not responsible for the payment of the notes.²⁹

(h) Summary of Rule as to Receivership Contracts in America. The rule in America fixing the liability in the case of contracts or engagements of the receivership, as gathered from the decisions, is as follows: If the court having jurisdic-

²⁶ *Cake v. Mohun* (1896), 164 U. S. 311, at 315, 41 L. ed. 447, 17 S. C. Rep. 100, citing *Ryan v. Rand*, 20 App. N. C. 313; *People v. Universal Life Ins. Co.*, 37 N. Y. S. Ct. 142, 30 Hun 142; *Ferrin v. Myrick*, 41 N. Y. 315; *Rogers v. Wendell*, 61 N. Y. Supr. 540, 54 Hun 540; *Schmittler v. Simon*, 114 N. Y. 176, 21 N. E. 162; also *Cowdry v. Gal-*

veston, etc., 93 U. S. 352, at 355, 23 L. ed. 950.

²⁷ *Towne v. Rice* (1877), 122 Mass. 67, at 75.

²⁸ *Archambeau v. Platt* (1899), 173 Mass. 249, at 250, 53 N. E. 816.

²⁹ *Zielian v. Baltimore Plate Ice Co.* (1911), 115 Md. 658, 81 Atl. 22, at 25.

tion and power, with due notice to the parties interested and in a proper hearing, gives explicit and direct orders to the receiver³⁰ or gives an undoubted implied power³¹ to enter into engagements, and if he does it the court pledges its faith to carry out those engagements, and the receiver individually is not liable for a failure to perform such an engagement.

If the receiver, without the direct or explicit order of court, and without any implied power, yet under color of his office as receiver, enters into a contract with third parties, such contract is the contract of the receiver personally and individually, and he is primarily liable. If such contract is proper and beneficial to the estate, and if there are funds available, the liability may be paid by order of the court out of such available funds. If there are not available funds, the receiver may have to pay such liabilities himself.³²

If the receiver enters into contracts outside the scope of his receivership, and without color of office, then, of course, he does it as an individual and his official character will not protect him against liability.³³ It may well be that when a transaction relates to receivership property the presumption is that a receiver binds himself officially and not personally. But this presumption, while proper to be considered by the jury, is no reason for taking a case from the jury.³⁴

If a subordinate of the receiver enters into a contract outside the scope of the receivership and under no orders of the receiver, of course the receiver can not be responsible. If the subordinate of the receiver, within the scope of the receiver-

³⁰ *Mercantile Trust Co. v. Kanawha* (1883), 58 Fed. 6; *Bank of Commerce v. Central R. R.* (1902), 115 Fed. 878, at 880; *Kirker v. Owings* (1889), 98 Fed. 499; *In re Angell* (1902), 131 Mich. 345, at 351, 91 N. W. 611; *Haines v. Buckeye Wheel Co.* (1915), 244 Fed. 289.

³¹ *Haines v. Buckeye Wheel Co.* (1915), 244 Fed. 289; *Bank v. Ball-Bearing Chain Co.*, 118 Iowa 698, at 703, 92 N. W. 712; *Cake v. Mohun*, 164 U. S. 311, 41 L. ed. 447, 17 S. C.

Rep. 100; *Hillsborough Grocery Co. v. Ingalls* (1910), 60 Fla. 105, 53 So. 930, cases cited.

³² *Atlantic Trust Co. v. Chapman* (1907), 208 U. S. 375, 52 L. ed. 528, 28 S. C. Rep. 406; *Haines v. Buckeye Wheel Co.* (1915), 244 Fed. 289; *Gutterson & G. v. Leb. I. & T. Co.* (1907), 151 Fed. 72.

³³ *Mittie Iron M. Co. v. McKinney* (1909), 172 Fed. 42.

³⁴ *Wolf v. Lovering* (1908), 159 Fed. 91, and cases cited.

ship and in the course of the management of the business entrusted to him, enters into a contract, on a doctrine analogous to the doctrine that trustees are not responsible for the torts or contracts of their employees, or subordinates, receivers are likewise not responsible, yet the res may be responsible.³⁵

§ 790. Liability of Receiver for Funds and Property Received. "A receiver must take care of funds as ordered by the court and in accordance with the statutes and laws of the sovereign as therein provided for. If the court and law is silent as to the keeping of the money, the receiver must keep it and deal with it as receiver with that degree of prudence and care which is ordinarily exercised by reasonable and cautious men in transacting their own business of like importance. Persons acting as trustees, executors, receivers and assignees are expected to take no more care of the property entrusted to them than they would of their own," was early held in England.³⁶

As indicating the principles set out above, Lord Chancellor Macclesfield,³⁷ in discussing the loss of funds by the failure of a banker, said that he was inclined to think that the receiver was not answerable for the loss any more than if he had been robbed of it.³⁸

On the question of a receiver being liable for negligence of others in the transaction of ordinary business Lord Hardwick laid down the law as early as in 1747 as follows: "It would be very hard to oblige the receiver to make good a loss which was not owing to any default of his."³⁹

The Supreme Court of Pennsylvania has cited with approval the following statement of the lower court: "A receiver is not only chargeable with moneys actually received by him,

³⁵ Kerr v. Little (1884), 39 N. J. Eq. 83, at 85.

³⁶ Knight v. Lord Plymouth (1747), 3 Atk. 480; In re Robins, 36 Minn. 66, 30 N. W. 304; In re Cornell, 110 N. Y. 351, 18 N. E. 142; State, ex rel., v. Germania Bk. of St. Paul (1908), 106 Minn. 164, at

172, 118 N. W. 683, 118 N. W. 686, 119 N. W. 61.

³⁷ Lord Eldon in Massey v. Banner (1820), 1 J. & W. 247.

³⁸ Lady Shaftsbury's case (1720), 2 Eq. Ca. Abr. 691.

³⁹ Knight v. Plymouth (1747), 3 Atk. 480.

but is equally chargeable and will be surcharged where moneys are due to the estate which are collectible, and which have not been collected or attempted to be collected by him.”⁴⁰ A receiver should exercise such care in renting property and collecting rents as might reasonably be expected of an ordinarily prudent person in the circumstances. If he fails by negligence to collect rents he should have collected, he is liable therefor.⁴¹

§ 791. Liability of Receiver when Transmitting Funds.

When a receiver has rents in his hands and they are large, it is a necessary precaution to remit such rents by bills or other means rather than in specie. When such a case presented itself and the receiver paid money to a tradesman and took bills for the sum, the tradesman being in credit at the time though he failed afterward, the receiver was held not liable.⁴² Receivers in care of property are responsible for good faith and reasonable diligence. To be liable they must be affected with culpable negligence or fraud.⁴³ In determining the character of the bank wherein a receiver shall deposit funds, it has been said “that degree of prudence and care is exacted which is ordinarily exercised by reasonably cautious men in transacting their own business of like importance.”⁴⁴ It may be properly said that the same degree of care should be exercised by a receiver in transmitting funds. No inflexible rule may be laid down to fit each case, but the usual method of careful business transmitting funds is to buy a bank draft. If a receiver does this under ordinary circumstances, it is hard to see on what grounds he would be liable if the bank failed.

§ 792. Liability of Receiver for Payments Made. It is the duty of a receiver to pay as ordered and not to pay anyone

⁴⁰ Tenth Nat. Bank v. Smith Construction Co. (1913), 242 Pa. St. 269, at 288, 89 Atl. 76.

⁴¹ Higgins v. Shields (1912), 151 Ky. Rep. 227, 151 S. W. 391.

⁴² Knight v. Lord Plymouth (1747), 3 Atk. 480.

⁴³ Story, J., in Burt v. Trevitt (1816), 1 Mason 101.

⁴⁴ State v. Corning State Savings Bank (1905), 128 Iowa 599, 105 N. W. 159.

else.⁴⁵ Thus a receiver was held liable who paid money to the plaintiff's solicitor directing the solicitor to pay it into court, which was never done.⁴⁶ If a receiver pays contrary to the orders of court he may be guilty of contempt of court, besides being held responsible for the money lost.

§ 793. Liability of Receiver when Depositing Funds. A receiver may deposit the funds coming into his hands as such in a bank of good standing and repute. In determining the character of the bank, that degree of prudence and care is exacted which is ordinarily exercised by reasonably cautious men in transacting their own business of like importance, and the same rule obtains with reference to continuing the deposit.⁴⁷

The receiver is not an insurer of the safety of the property. The measure of his responsibility is analogous to that of a guardian and administrator, and when he uses ordinary care in his duties, that is, such care as an ordinarily prudent person would use in the handling of his own property, he has fulfilled the measure of his duty as such receiver.⁴⁸ See subject discussed in secs. 784 and 785, "Liability of Receiver for His Own Torts—English and American Doctrines."

Under certain peculiar circumstances it has been held that a receiver should not deposit the money in bank.⁴⁹ Cases holding such a doctrine are, however, exceptions to the general rule.

§ 794. Liability of Receiver for Interest on Funds. A receiver should not deal with the money of the estate as his own, but should at all times deposit the money and keep the

⁴⁵ *Ind. Coope & Co. v. Kidd* (1894), 63 L. J. (Q. B.) 726.

⁴⁶ *Delfosse v. Crawshay* (1835), 4 L. J. Ch. (N.S.) 32.

⁴⁷ *State v. Savings Bank* (1905), 128 Iowa 599, 105 N. W. 159; *Knight v. Lord Plymouth* (1747), 3 Atk. 480; *Groesbeck v. Rod Oliver* (1906), 44 Tex. Civ. App. 303, 97 S. W. 1092.

⁴⁸ *Groesbeck Cotton Gin & Com-*

press Co. v. Oliver (1906), 44 Tex. Civ. App. 303, 97 S. W. 1092, citing 90 S. W. 69; 35 S. W. 427; 18 Tex. Civ. App. 241; 39 Tex. 56; 14 N. E. 415; 50 S. W. 855; 34 S. W. 427, 31 L. R. A. 844.

⁴⁹ *Ricks v. Broyles* (1887), 78 Ga. 610, 3 S. E. 772; *State v. Collins* (1887), 97 N. C. 186, 1 S. E. 653.

money in his name as receiver, but not in his individual account.⁵⁰ A receiver is not allowed interest himself.⁵¹ If he puts the money out at interest and loss occurs, he is responsible.⁵² It must be said, however, that it may be proper for a receiver as such to receive interest from deposits, in which event such interest does not belong to the receiver as an individual.⁵³

It has been held that a trust company which acts as receiver may not under certain circumstances be surcharged with interest upon receivership moneys deposited in its own bank in a business account subject to check, where it appears such deposit was made in good faith, with knowledge and consent of the company whose affairs were being administered and of its creditors, and such checking account without interest was justified by the nature of the receiver's duties, and such benefits, if any, as accrued to the bank therefrom were considered in making the claims for compensation.⁵⁴

The court have even gone farther and held that a receiver directed by the court to lend a fund at interest on real estate or other good security, who fails to do so, but keeps the fund in his own hands, is chargeable with simple interest from the time the fund was ordered invested, the loss of interest being due to the failure of the receiver to obey the plain mandate of the court.⁵⁵ Where he mingles the trust funds with his own or uses them personally, he may be charged interest.⁵⁶

§ 795. Liability of Receiver for Improper Expenditures of Preservation. A receiver is not authorized without previous direction to incur any expense on account of property in his

⁵⁰ *Wren v. Kirton* (1805), 11 Ves., Jr., 380; *Schwartz v. Keystone Oil Co.* (1893), 153 Pa. St. 288, 25 Atl. 1018; *Salway v. Salway* (1831), 2 R. & M. 215.

⁵¹ *Shaw v. Rhodes* (1826), 2 Russ. 539.

⁵² *Drever v. Mandesley* (1844), 13 L. J. 433. See *Wilkinson v. Bewick* (1858), 4 Jur. (N.S.) 1010.

⁵³ *Roller v. Paul* (1906), 106 Va. 217, 55 S. E. 558.

⁵⁴ *Haddock v. Plymouth Coal Co.* (1912), 237 Pa. St. 37, 85 Atl. 23.

⁵⁵ *Cecil v. Clark* (1911), 69 W. Va. 641, 72 S. E. 737; *Hooper v. Winston*, 24 Ill. 353; *Rosenthal v. McGraw*, 138 Fed. 721; *Roller v. Paul* (1906), 106 Va. 214, 55 S. E. 558.

⁵⁶ *Higgins v. Shields* (1912), 151 Ky. Rep. 227, 151 S. W. 391.

hands, beyond what is absolutely essential to its preservation and use as contemplated by his appointment.⁵⁷

Expenditures of a railroad receiver have been laid down by Mr. Justice Bradley when sitting as circuit judge.⁵⁸

“It may be laid down as a general proposition that all outlays made by the receiver in good faith, in the ordinary course, with a view to advance and promote the business of the road and to render it profitable and successful, are fairly within the line of discretion which is necessarily allowed to a receiver entrusted with the management and operation of a railroad in his hands. His duties, and the discretion with which he is invested, are very different from those of a passive receiver appointed merely to collect and hold moneys due on prior transactions or rents accruing from houses and lands. And to such outlays in ordinary course may properly be referred, not only the keeping of the road, buildings and rolling stock in repair, but also providing for such additional accommodation stock and instrumentalities as the necessities of the business may require, always referring to the court, or to the master appointed in that behalf, for advice and authority in any matter of importance which may involve a considerable outlay of money in lump. * * * In extraordinary cases involving a large outlay of money, the receiver should always apply to the court in advance and obtain its authority for the purchase or improvement proposed.”⁵⁹

Degree of Diligence in Preserving Property. “In respect to property in the custody of officers of the court pending process, they are undoubtedly responsible for good faith and reasonable diligence. If the property be lost or injured by a negligent or dishonest execution of their trust, they are liable in damages, but they are not of course liable because an

⁵⁷ Huff v. Bidwell, 151 Fed. 563; Cowdry v. Galveston, etc. (1876), 93 U. S. 352, at 354, 23 L. ed. 950. See Union Trust Co. v. Illinois (1885), 117 U. S. 434, 29 L. ed. 963; Burroughs v. Toxaway Co. (1910), 185 Fed. 137.

⁵⁸ Cowdry v. Railroad Co. (1870), 1 Woods 336; quoted, Lehigh, etc., v. Central R. R. (1882), 35 N. J. Eq. 428.

⁵⁹ Cowdry v. Railroad Co. (1870), 1 Woods 336.

embezzlement or theft is proved. They must be affected with culpable negligence or fraud, and such is the confidence the court places in its officers that perhaps the proof of such negligence or fraud ought to be thrown on the other party.”⁶⁰

§ 796. Liability of Lienholder for Preservation of Property.

Costs of realization do not include costs of preservation. Costs of preservation are postponed to the costs of realization.⁶¹ Costs of preservation are postponed to any overriding charge outside of the action, but take priority over all other claims, including costs of action of the parties thereto.⁶² A receiver is an officer of the court and the court is bound to see that he is paid, just as if the trustee had employed a manager. They would have been bound to pay him without regard to the sufficiency of the estate to meet the claims upon it.

§ 797. Liability of Receiver for Improper Repairs. As early as 1805 Lord Chancellor Eldon⁶³ said, “The court was not in the habit of permitting receivers and committees of lunatics to apply the trust fund in repair to any considerable extent,” without a previous application. Later on, in 1816, Lord Eldon said, “But now when the receiver had laid out money without such previous order, it was usual to refer it to the master to see if the transaction were beneficial to the parties, and if found to be so, the receiver was allowed money so laid out.”⁶⁴

If repairs are sanctioned by the court, the receiver is not liable for them.⁶⁵ The modern rule seems to be that the matter of property repairs falls within the functions of a receiver when a receiver is to receive the rents and profits, and he is allowed to do certain repairs without even coming into court.⁶⁶

⁶⁰ Story, J., in *Burke v. Trevitt* (1816), 1 Mason 101.

⁶¹ In *re Oriental Hotels Co.* (1871), L. R. 12 Eq. 126; *Lathom v. Greenwich Ferry Co.* (1895), 72 L. T. 790.

⁶² In *re New Zealand Mid. R. R.* (1901), 2 Ch. 357; In *re Queen's Hotel Co., Ltd.* (1900), 1 Ch. 792; *Batten v. Wedgewood, etc.* (1884),

28 Ch. D. 317; In *re London United Breweries* (1907), 11 Ch. D. 511.

⁶³ *The Attorney General v. Vigor* (1805), 11 Ves. Jr. 563.

⁶⁴ *Tempest v. Ord* (1816), 2 Mer. 55.

⁶⁵ *Morrison v. Morrison* (1855), 7 DeG., M. & G. 223.

⁶⁶ In *re Graham* (1895), 1 Ch. D. 66, at 72.

It is the better practice to get a court order for any expenditure on repairs amounting to a considerable amount.

§ 798. Liability of Lienholder for Costs of Realization. It frequently happens that in a proceeding by a lienholder or other party, a receiver is appointed. In the course of time he sells the property either subject to the lien or free from the lien. If he sells it free from the lien or liens he distributes the fund to the lienholders among others. In this case the receiver realizes the property for the lienholder and accomplishes for him what would be accomplished in a foreclosure proceeding by the lienholder.

Receivers and trustees in bankruptcy proceedings, receivers of railways and also receivers in other cases frequently sell property free from liens. "The property must be realized by someone in order that it may be distributed, and whoever has realized it and brought the proceeds under the control of the court has really constituted the fund which has to be distributed for the benefit of the receiver and everyone else who is entitled."⁶⁷ The costs of realizing the fund is the first charge thereon and the costs of realization include the costs of unsuccessful efforts to realize undertakings by direction of the court as well as efforts that succeed.⁶⁸

Receivers' costs follow costs of realization.⁶⁹ Then costs come out of the corpus of the property if there is not sufficient personal property to pay them.⁷⁰ It is impossible to lay down a hard and fast rule as to the order of distribution but the principle of distribution will be explained in ch. XXX.

Where a court has appointed a receiver who has incurred liabilities in the proper management of the estate which was given him to manage, the court will see that those creditors are satisfied either by the receiver or in case the receiver

⁶⁷ *Batten v. Wedgewood* (1884), 28 Ch. D. 314, at 325.

⁶⁸ *Ramsay v. Simpson* (1849), 1 I. R. 194, at 199; *In re London United Brew., Ltd.* (1907), 2 Ch. D. 511.

⁶⁹ *Batten v. Wedgewood Coal & Iron Co.* (1884), 28 Ch. D. 317; *Ex parte Royal* (1875), L. R. 20 Eq. Case 781.

⁷⁰ *Batten v. Wedgewood Coal & Iron Co.* (1884), 28 Ch. D. 317.

should become bankrupt, or there should be any other reason making it advisable by payment direct to the creditors out of the funds in court. The order of payment in such a case was made as follows: (1) Take and pay the costs of the realization of the property. (2) Then to direct an inquiry whether any and what debts and liabilities have been properly incurred by the receiver which are still outstanding. (3) As the fund is deficient and the costs of realization will be taxed as between solicitor and client.⁷¹

Liability of Lienholder Acquiescing in Appointment. When a mortgagee consents to the appointment of a receiver of the mortgaged premises, a mill, and to the operation of the business, the mill, such debts as are incurred by the receiver in the operation of the business will take precedence over the mortgage debt.⁷²

§ 799. Liability of Lienholder for Costs of Realization in Bankruptcy Proceedings.^{72a} The United States Bankruptcy Act of 1898, par. D of sec. 67 and amendments thereto, provides as follows: "Liens given or acquired in good faith and not in contemplation of or in fraud of this act and for a present consideration which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by the act." It may be said, however, that, "A court which appoints a receiver acquires by virtue of that appointment certain rights and assumes certain obligations, and the expenses which the court creates in discharge of those obligations are burdens necessarily on the property taken possession of, and this irrespective of the question who may be the ultimate owner or who may have a preferred lien or who may invoke the receivership."⁷³

⁷¹ London United Breweries (1907), 11 Ch. D. 511.

⁷² *Buster v. Mann* (1900), 69 Ark. 23, 62 S. W. 588. See doctrine discussed at length in *In re Benwood Brewing Co.* (1913), 202 Fed. 326, at 328, et seq. See *Sturwold v. The*

Geo. Vehr Co. (1897), 5 Ohio N. P. 37.

^{72a} See ch. XVII, supra, "Receivers in Bankruptcy Proceedings."

⁷³ *Kneeland v. American Loan Co.* (1889), 136 U. S. 98, 34 L. ed. 379, 10 S. Ct. Rep. 950.

Ordinarily, however, unsecured debts will not take precedence in the distribution of the proceeds of a sale of property by a receiver.⁷⁴ Yet in the case of a railroad, if current earnings are used for the benefit of the mortgage creditors, before current expenses are paid the mortgage security is chargeable in equity with the restoration of the funds which has been improperly applied to their use.⁷⁵

"It is the exception and not the rule that such priority of liens can be displaced."⁷⁶ In the sale of mortgaged property by an assignee in bankruptcy when the fund is not more than sufficient to satisfy the mortgage, the fund belongs to the mortgagee and is not chargeable with any expense incurred by the assignee in the execution of his trust.⁷⁷

When a sale is made of mortgaged property in the hands of the bankruptcy court, the mortgagees are not concerned with the bankruptcy proceedings generally. They can not, therefore, be charged with the cost of instituting them or carrying them on.⁷⁸

Although the Bankruptcy Act,⁷⁹ secs. 62 and 64, as it was in force 1902, gave the court power to authorize a trustee to conduct, for a limited period, the business of the bankrupt; nevertheless, it is very doubtful if the expenses of continuing the business of the bankrupt under such circumstances would take priority over valid liens already existing and fixed.⁸⁰

A creditor who simply comes into a bankruptcy court and establishes a debt that is a lien upon specific property of the bankrupt should not be charged, so as to reduce the security by making the fund arising from such specific property liable for the costs of the general administration of the bankrupt's estate.⁸¹

⁷⁴ *St. Louis Ry. v. Cleveland* (1887), 125 U. S. 658, at 673, 31 L. ed. 832.

⁷⁵ *Burnham v. Bowen* (1883), 111 U. S. 776, at 783, 28 L. ed. 576, 4 S. C. Rep. 675.

⁷⁶ *Kneeland v. American Loan Co.* (1889), 136 U. S. 98, 34 L. ed. 379.

⁷⁷ *Stewart v. Platt* (1879), 101 U. S. 731, 25 L. ed. 816.

⁷⁸ *In re Prince & Walter* (1904), 131 Fed. 552.

⁷⁹ *United States Comp. St. of 1916*, pp. 11588, 11619, 30 Stat. 562, 30 Stat. 563, 32 Stat. 800, 34 Stat. 267.

⁸⁰ *In re Bourlier Cornice, etc.* (1905), 133 Fed. 963.

⁸¹ *Mills v. V. & C. Lumber Co.* (1908), 164 Fed. 171.

However, by coming into the bankruptcy court, a holder of a valid lien upon the estate of a bankrupt comes into an appropriate place and into a court amply able to enforce and protect his rights.⁸² The enforcement of his lien in another court would entail upon the proceeds of the property upon which the lien exists the payment of the appropriate court costs, and so in the enforcement of such lien in a court of bankruptcy the proceeds of the property of the bankrupt upon which the lien exists is properly chargeable with the costs of such court appropriate to such enforcement, but with no other or further costs. They are not chargeable with the general costs of the administration of the bankrupt's estate, such as the services of a receiver in carrying on the business of the bankrupt, the expenses and losses of such business, the fees of the attorney for such receiver, and general fees of the trustee, or those of his attorney.

§ 800. Liability of Receiver for Costs of Litigation. The receiver of his own initiative has no right to bring or defend a suit⁸³ unless specially authorized by statute. A receiver who without sanction of court defends an action brought against him by a party to the cause is not on that account disentitled to the assistance of the court, in recovering from such party the extra costs of the action, although if his defense had failed he would not under such circumstances have been entitled to reimbursement.⁸⁴

A receiver of a corporation appointed by a court of equity can not bring suits in his own name to recover property of the corporation which has never been in his possession unless he is authorized so to do by statute, or by the decree of a court competent to give him such authority, or unless the title to the property has been conveyed to him.⁸⁵

⁸² *In re Williams' Estate* (1907), 156 Fed. 939, and cases cited.

⁸³ *Wynn v. Newborough* (1790), 3 Bro. C. R. 88; *Viola v. Anglo-American, etc.* (1912), II Ch. D. 311.

⁸⁴ *Bristowe v. Needham* (1847), 2 Phil. Ch. 189.

⁸⁵ *Wilson v. Welch* (1892), 157 Mass. 80, 31 N. E. 712.

When the appointing court makes a proper order to its receiver to act for the defendant in the main suit and continue an action already started by the defendant, the receiver should be allowed the costs of such suit as part of his proper charges as receiver in the main suit.⁸⁶

§ 801. Liability of Receiver on Defendant's Leases. "By the appointment of a receiver the rights of the landlord are suspended through the action of the court. So far as the court interferes by the appointment of a receiver to prevent a landlord from exercising his rights there may be a shadow of a ground for suggesting that the receiver should make good the loss the landlord has thereby sustained. But no authority has been cited to show that a receiver has ever been ordered to do anything of the kind, and it is not our province to create a new equity. If you have a company or person whose estate is being dealt with or administered by the court, and a liquidator or receiver appointed by the court has occupied or used premises that are part of the estate, then ask the rent and other outgoings payable to the landlord or other parties in respect to the premises for that occupation or user and for which the company or person whose estate is being dealt with or administered is liable, and the court will see that such rent and other outgoings are paid out of the assets got in by the liquidator or receiver."⁸⁷

The duties and privileges of a receiver relative to property of which the defendant is lessee seem to be analogous to the duties and privileges of an assignee in bankruptcy.⁸⁸ "When the law says that assignees of a bankrupt may take the bankrupt's property or not according as it is or is not beneficial to the creditors, the same law in order to be consistent must also say that they may do those previous acts which are necessary to ascertain whether the property be beneficial or

⁸⁶ *Viola v. Anglo-American* (1912), 11 Ch. D. 306.

⁸⁷ *Hand v. Blow* (1901), 11 Ch. D. 721, at 736.

⁸⁸ *Sunflower Oil Co. v. Wilson* (1891), 142 U. S. 313, at 322, 35 L. ed. 1025 12 S. C. Rep. 235.

not before they take it,"⁸⁹ or analogous to the situation in insolvency.⁹⁰ In America the doctrine that a receiver may take possession of a leasehold and use the premises for a reasonable time to enable him to elect whether he could adopt the contract and make it his own or surrender the property to the lessor, so far as he is able to do so without affecting the terms as between lessor and lessee, has become the settled rule in the courts of the United States.⁹¹ Receivers can take possession and occupy and use the premises under lease by the defendant and assume liability to pay the rent according to the covenants of the lease, if they deem it for the interest of the creditors so to do, but until such election, or the doing of some act which would in law be equivalent to an election, they are not liable. As receivers they can not be held merely on the covenants, but become liable solely by reason of their own acts.⁹²

§ 802. Liability of Receiver on Defendant's Contracts. If a receiver takes hold of certain property of an individual, the receiver has nothing to do with the individual's contracts except so far as such contracts affect or concern the property in the hands of the receiver.⁹³ If, however, a receiver is appointed over the business of a corporation, although the entity of the corporation remains and the corporation through its officers has technically power to make contracts and carry out contracts, nevertheless, the effect of putting in a receiver over the business of a corporation is to suspend the activities of the directors and officers of the corporation and put the

⁸⁹ *Turner v. Richardson* (1806), 7 East 336, at 345.

⁹⁰ *Hoyt v. Stoddard* (1861), 2 Allen 442.

⁹¹ *Dayton Hydraulic Co. v. Fel-senthall* (1902), 116 Fed. 965; *Sun-flower Oil Co. v. Wilson* (1891), 142 U. S. 313, at 322, 35 L. ed. 1025, 12 S. C. Rep. 235; *Quincy, etc., Ry. v. Humphries* (1891), 145 U. S. 101, 36 L. ed. 632, 12 S. C. Rep. 787; *Carswell v. Farmers L. & T. Co.*

(1896), 74 Fed. 88; *Platt v. Phila-delphia, etc.* (1898), 84 Fed. 535.

⁹² *Commonwealth v. Franklin Ins. Co.* (1874), 115 Mass. 278; *Sun-flower Oil Co. v. Wilson* (1891), 142 U. S. 313, at 322, 35 L. ed. 1025, 12 S. C. Rep. 235.

⁹³ *Reid v. Explosives Co.* (1887), 57 L. T. 439, 19 Q. B. Div. 264; *Parsons v. Sovereign Bank of Can-ada* (1912), Priv. Coun. App., 107 L. T. Rep. 575.

control over such activities and assets in the hands of the court acting through the receiver.⁹⁴ When a receiver is appointed over a railroad company the receiver must enter into various activities or stop the running of the road, and public policy generally requires that the road be run. It must be noted that there are cases where a receiver is appointed without directions given to the company to give up possession. In that case the argument that "then ipso facto the company or persons carrying on the business are turned out is neither reasonable nor plausible."⁹⁵

When a receiver and manager is ordered to continue the business of a manufacturing plant, the company itself remains in existence until dissolved by proper authority, but the company loses its title to control its assets and affairs, with the result that some of its contracts, such as those in which it stands to an employee in the relation of master and servant, being of a personal nature, may in certain cases be determined by the mere change of possession and the company may be liable for breach. But it does not follow that all the contracts of the company are determined. Where contracts to supply paper, for instance, were entered into before the receivership, there was no ground for presuming that the receivers and managers, when they fulfilled these contracts, intended to act otherwise than in the name of the company, to carry to a conclusion the business which was current, or that they meant to repudiate the obligations of the company. In the absence of a liquidation the persona of the contracting company remained legally intact though controlled by the receivers and managers. When receivers did repudiate the contracts and refused to deliver more paper, a claim for damages arose against the company.⁹⁶

It is frequently said that a receiver has a right to break the outstanding and existing contracts which he finds on the books

⁹⁴ *Parsons, et al., v. Sovereign Bank of Canada* (1912), Priv. Coun. App., 107 L. T. R. 573.

⁹⁵ *In re Marriage Neave & Co.* (1896), C. A. II Ch. D. 676.

⁹⁶ *Parsons v. Sovereign Bank of*

of the company which he takes hold of. Says Cozens-Hardy, M.R.:⁹⁷ "I do not quite like the phrase 'break these contracts' because it is not a question of breaking them. They are still subsisting but it is impossible to suggest that the receiver and manager is under any liability to the persons who have entered into them. In my opinion they are not contracts with him; they are contracts made with the company, which is still a company and has not yet been wound up. If he discharges the obligations of the company under the contracts he will be entitled to receive the money due from the other contracting parties to the company." The contracts are not binding on the receiver. A receiver may be justified in refraining from doing anything toward completing a contract which he finds subsisting when he takes hold.⁹⁸

The authority in America on the subject of the relation of the receiver to the defendant's contracts is summed up as follows: "The general rule applicable to this class of cases is undisputed that an assignee or receiver is not bound to adopt the contracts, accept the leases or otherwise step into the shoes of his assignees, if in his opinion it would be unprofitable or undesirable to do so, and he is entitled to a reasonable time to elect whether to adopt or repudiate such contracts. If he elects to adopt a lease, the receiver becomes vested with the title to the leasehold interest, and a privity of estate is thereby created between the lessor and the receiver by which the latter becomes liable upon the covenant to pay rent."⁹⁹

"A receiver of a railroad is not bound by an agreement made before his appointment between the railroad company and its employees, whereby the latter are not to be discharged except for cause to be determined by arbitrations."¹

Canada (1912), Priv. Counc. App., 107 L. T. R. 574; *Forster v. Nixon's Navigation Co.* (1907), 23 T. L. R. 138.

⁹⁷ *In re Newdigate Colliery, etc.* (1912), 1 Ch. D. 470 C. A.

⁹⁸ *Thames Iron, etc.* (1912), 106 L. T. 674.

⁹⁹ *United States T. Co. v. Wabash*

Ry. (1892), 150 U. S. 309, 37 L. ed. 1085, 14 S. C. Rep. 86, quoting *Sparkaw v. Yerkes*, 142 U. S. 1, at 13, 35 L. ed. 915, 12 S. C. Rep. 104; *Sunflower Oil Co. v. Wilson*, 142 U. S. 313, at 322, 35 L. ed. 1025, 12 S. C. Rep. 235.

¹ *In re Seattle L. T. & E. Ry. Co.* (1894), 61 Fed. 541.

A receiver's position is analogous to that of an executor who takes possession and enjoys the occupation of property held under a lease by his testator. He thereby becomes liable for the payment of the rent accruing during his occupation of the premises according to the terms of the lease under which it was acquired.²

§ 803. Liability of Defendant after Appointment of Receiver. A corporation can not be convicted for crimes committed by receivers in charge of the corporation who have the management over the company and business of the company, for no man or corporation should be criminally responsible for acts which he has no power to prevent.³

Likewise a corporation whose property has been taken out of its possession and control by the court through the appointment of a receiver, when the corporation has nothing to do with the management or operation of it, can not be held civilly liable for injuries resulting from such operation.⁴

Liability of Corporation for Torts of Receiver. Where a claim is in existence against a receiver operating a railroad or other property for the court, it is within the power of such court on terminating the receivership, to make and provide for settlement of all claims of parties against such receiver growing out of his operation of the road or business. If the property goes to a judicial sale and a fund has been realized for distribution, then upon notice appropriate to a proceeding in rem, a claimant would in the absence of special and unusual circumstances be bound by the disposition of the property by the court and the orders made in the proceeding disposing of his claim.

If, however, there is no judicial sale and there is no fund realized for distribution by final decree after notice to and

² Woodruff v. Erie Ry. Co. (1883), 93 N. Y. 624.

³ State v. Railroad (1910), 152 N. C. 786, 67 S. E. 42; Railroad Co. v. Commonwealth, 33 S. W. 822 (Ky.); State v. Railroad, 88 Iowa

689, 56 N. W. 400; State v. Railroad, 115 Ind. 466, 17 N. E. 909; State v. Railroad, 30 Vt. 108.

⁴ Eckels v. Farley (1907), 131 Ill. App. 557, at 560, and cases cited.

a hearing of those having claims against the fund, and where the railroad and its appurtenances are returned to the possession of the railroad company, then it by no means follows that the railroad company takes the property back freed from all claims that may have originated during the receivership.⁵

The Illinois courts hold a corporation which has received back its property upon the discharge of a receiver is liable for torts occurring during the management to the extent that the net income was applied by the receiver to the permanent improvement of the property.⁶

§ 804. Liability of Receiver in Deceit. Receivers are not in the full sense agents of the court appointing them, therefore the court is not liable for contracts the receiver makes, even if it is in the course of the receiver's duties, although the contracts the receiver makes are by the American authorities in a substantial sense the court's contracts.⁷

If a receiver acts in good faith, but under a mistaken view of his powers, he perhaps would not be liable at all. If a receiver wilfully and corruptly exceeds his powers, he should be held liable for the actual damage sustained by the contract.⁸

If a receiver by fraud induces third persons to deliver property to him without paying therefor, such parties, upon proper application to the court, may obtain relief; but if they allow the property to be incorporated with the plant of an insolvent corporation and take unauthorized notes, etc., for the property, they can gain no preference over the first lien creditors, or

⁵ *Texas & Pac. Ry. v. Bloom* (1896), 164 U. S. 636, at 639, 41 L. ed. 580, 17 S. C. Rep. 216. See *Kirby Lumber Co. v. Cunningham*, 154 S. W. 288, at 291, *Texas Civ. App.*, where the court holds that the company taking back the property must have assumed responsibility, etc.

⁶ *Bartlett v. Cicero Light Co.* (1898), 177 Ill. 68, 52 N. E. 339;

Litchfield M. & P. Co. v. Beanblossom (1907), 138 Ill. App. 122.

⁷ *Atlantic Trust Co. v. Chapman* (1907), 208 U. S. 367, 52 L. ed. 528.

⁸ *Stanton v. Alabama, etc.* (1875), 2 Woods 506, 22 Fed. Cas. No. 1065. See *In re Erie Lumber Co.* (1906), 150 Fed. 817, at 830; *Haines v. Buckeye Wheel Co.* (1915), 224 Fed. 289, at 297.

those who hold receiver's certificates, etc.⁹ Parties dealing with a receiver are presumed to know what the receiver can and can not do.¹⁰

When a receiver acts apparently as receiver or under color of authority and is not in fact authorized to so act, what is the measure of damages to the person so deceived? Said Lord Esher, M. R., in 1886:¹¹ "The damages under the general rule are arrived at by considering the difference in the position he would have been in had the representation been true, and the position he is actually in, in consequence of its being untrue."

§ 805. Liability of Receiver for Improper Sale. A sale of a launch held by a receiver pending a trial of replevin for the launch was a breach of duty on the part of the receiver and subjects his surety to answer for the default. It was in law a conversion of the property.¹²

§ 806. Liability of Succeeding Receiver on Predecessor's Obligations. Although the American courts refuse to adopt unreservedly the English doctrine that a receiver's contracts are his own and he is primarily liable thereon, Van Fleet, Vice-Chancellor of New Jersey, in 1886, says: "I have always supposed the law on this subject to be so firmly settled as to be beyond all question, and that it had become an axiom that only the parties to a contract, or their legal representatives, were bound by it or liable at law for breaking it."

Thus the chancellor reasoned that contracts made by a preceding receiver impose no legal duty or obligation on his successor, and damages can not be recovered at law against the succeeding receiver for refusing to perform the contracts

⁹ York Mfg. Co. v. Hoblitzell Nat. B. (1912), 118 Md. 505, 84 Atl. 559.

¹⁰ York Mfg. Co. v. Hoblitzell Nat. B. (1912), 118 Md. 512, 84 Atl. 559.

¹¹ Firbank's Executors v. Humphreys (1886), 18 Q. B. D. 54, at 58; cited in Zieman v. Baltimore

Plate Ice Co. (1911), 115 Md. 658, 81 Atl. 22. See also Simons v. Patchett (1857), 7 El. & Bl. 571.

¹² Southwestern Surety Co. v. Pacific Coast Casualty Co. (1916), 92 Wash. 654, 159 Pac. 788.

of his predecessor.¹³ This court suggests the doctrine that the contracts of his receiver should be regarded as the obligations of the trust, the trust property being the principle in the transaction and the receiver the new agent. Following this the court says that when a receiver of a railroad makes proper contracts for labor and supplies reasonably necessary to enable him to perform his duties, such contracts bind the trust. This court did not go so far as to say the contracts of the receiver are in a substantial sense the contracts and engagements of the court.¹⁴ However, the succeeding receiver will not be forced to discharge the contracts of the former receiver. The question of a succeeding receiver's liabilities came up again in 1891 before the Supreme Court of Illinois, construing the Act of Congress of March 3, 1887, which permits suits at law against receivers as such without previous leave of the court in which such a receiver or manager was appointed.

The court said: "It is unreasonable to suppose that it was the intention of congress that actions at law should not be maintained for acts committed by the employees of a receiver unless such actions were brought and prosecuted to judgment while such particular receiver remained in office, for in that event the right to prosecute suits at law and the right to trial by jury, which are the rights which the statute intended to preserve and protect, could at any and all times be cut off and destroyed by the resignation or discharge of the particular receiver during whose administration of the receivership the torts were committed or injuries received."¹⁵

The Supreme Court of the United States affirmed this decision¹⁶ and said: "So long as the property of the corporation remains in the custody of the court and is administered through the agency of a receiver, such receivership is continuous and uninterrupted until the court relinquishes its hold upon the

¹³ The Lehigh Coal & Nav. Co. v. Railroad (1886), 41 N. J. E. 167, at 171, 3 Atl. 134. See also Vanderbilt v. Central R. R. (1887), 43 N. J. E. 669, 12 Atl. 188.

¹⁴ Atlantic Trust Co. v. Chapman (1907), 208 U. S. 367, 52 L. ed. 528.

¹⁵ McNulta v. Lochridge (1891), 137 Ill. 270, at 283, 27 N. E. 452.

¹⁶ McNulta v. Lochridge (1891), 141 U. S. 327, 35 L. ed. 796.

property though its personnel may be the subject of repeated changes.”¹⁷

§ 807. Receiver's Liability when Acting under Advice of Counsel. “The maxim that every person is presumed to know the law is not always applicable to trustees. On the contrary, they may be exonerated from losses resulting from their ignorance of the law in cases where they exercise proper diligence and precaution and act upon the advice of counsel.”¹⁸ When a receiver's conduct appears to have been prudent and he has by inquiry beforehand satisfied himself of the integrity of his attorney at that time, he was held not to be liable to the estate for the loss of a claim which was collected by the attorney, who afterwards absconded without paying it over.¹⁹

Likewise a receiver failing to bring suit in time against stockholders to recover stockholders' liability, relying on the advice of his counsel as to the proper time to commence such actions, has been held not to be chargeable for the consequences of such delay, it appearing that such counsel was competent and had been retained with the knowledge of the creditors and the approval of the court.²⁰ When it is shown that the receiver is aware of the provisions of the law as to bringing stockholders' liability suits, it is his duty to force his attorney to bring such suits and his accounts may be surcharged with the losses by reason of such failure to prosecute the actions against stockholders.²¹

§ 808. Liability of Receiver when Appointing Order Vacated. When a court appoints a receiver and such receiver obeys the orders of the court and incurs proper expenses, if the property does not belong to the defendant but belongs to a third party,

¹⁷ *McNulta v. Lochridge* (1891), 141 U. S. 327, 35 L. ed. 796.

¹⁸ *Miller v. Proctor*, 20 O. S. 442. See, to same effect, *Neff's Appeal*, 57 Pa. St. 91; *Bradley's Appeal*, 89 Pa. St. 514, at 522.

¹⁹ *Powers v. Loughbridge*, 38 N. J. Eq. 396.

²⁰ *State, ex rel., v. Germania B. of St. P.* (1908), 106 Minn. 164, at 170, 118 N. W. 683, 686, 119 N. W. 61.

²¹ *People v. Bank of Staten Island* (1911), 127 N. Y. S. 906, at 907.

then the third party has been wronged and it is inequitable that the receiver's remuneration be paid out of the property. If a court appoints a receiver and the appointment is set aside by an upper court, a somewhat similar situation presents itself. If the court had no jurisdiction or improperly appointed the receiver, how can the property be held to pay the costs of the receivership? Yet "the receiver is the officer of the court and the court is bound to see him paid."²²

Where a receiver is appointed in an action for an accounting between partners, where the order is reversed, the receiver's fees must be paid by the unsuccessful party and not out of the property.²³ If the unsuccessful party were unable to pay the receiver, it may well be doubted whether any authority exists to enforce payment of his commissions out of any portion of the property or fund belonging to the party who has succeeded in vacating the receivership. There might be cases when a receiver was erroneously appointed, but not under such circumstances as to make the appointment absolutely void which would warrant an order that his disbursements be paid out of the funds, as for example, where the property consisted of a head of cattle for which the receiver had to buy fodder. In such a case it would be fair and just to charge the successful party with the cost of feeding, for he would have had to incur it if the animals had remained in his own custody.²⁴

In *French v. Gifford*²⁵ it was said: "It would be an unjust and unequitable rule if in all cases the receiver should be entitled to his compensation from the fund in his hands without reference to the legality of his appointment. Under the operation of such rule persons might be made to suffer great loss." The reasoning of this statement seems to be sound, but the further statement made by the court that the compensation of the receiver is "costs," which ought to be adjudged against the unsuccessful party, may well be doubted because the re-

²² *Batten v. Wedgewood* (1885), 28 Ch. D. 325.

²³ *Weston v. Watts* (1887), 45 Hun 219.

²⁴ *Weston v. Watts* (1887), 45 Hun 219, at 224.

²⁵ *French v. Gifford* (1871), 31 Iowa 428.

ceiver's remuneration is held to come, before the costs of suit²⁶ or so-called costs of the action.

Receiver's Remunerations when Order of Appointment Vacated. The English cases hold that a receiver's remuneration takes precedence over all other claims, including costs of the action of the parties thereto.²⁷ The receiver's remuneration, however, is postponed to the costs of realization of the property.²⁸ Ought the receiver be paid his remuneration before it can be said that there is anything to distribute in the payment of costs or anything else? He is the officer of the court and the court is bound to see that he is paid, just as if the trustee had employed a manager. They would have been bound to pay him without regard to the sufficiency of the estate to meet the claims upon it.²⁹ The costs of realization must come in priority to the receiver, then comes the balance due the receiver, including his remuneration.³⁰

§ 809. Liability of Coreceivers. The rule was announced as early as June 6, 9 Car. I, in the case of *Townley v. Sherborne*,³¹ that a trustee is not responsible for the acts or defaults of his co-trustee except there be connivance, co-operation, permission, acquiescence, or participation which would bring liability.³²

Although a receiver is not a trustee in the full sense of the word, nevertheless, he holds property of others and he is a quasi-trustee,³³ that is, the measure of care which should

²⁶ *Batten v. Wedgewood* (1885), 28 Ch. D. 317.

²⁷ *Ex parte Royle* (1875), L. R. 20 Eq. 780; *Batten v. Wedgewood*, etc. (1884), 28 Ch. D. 317; *Strapp v. Bull & Son Co.* (1895), C. A. 1895, 11 Ch. D. 9; *Davy v. Searth* (1906), 1 Ch. 55; *In re Gladsir Copper Mines* (1906), 1 Ch. 365; *In re London United Breweries* (1907), 11 Ch. D. 511; *In re Boynton, Ltd.* (1910), 1 Ch. D. 519.

²⁸ *Batten v. Wedgewood* (1884), 28 Ch. D. 317; *In re London United Breweries* (1907), 11 Ch. D. 511.

²⁹ *Courand v. Hammer* (1846), 9 Beav. 3.

³⁰ *Batten v. Wedgewood* (1884), 28 Ch. D. 324.

³¹ *Townley v. Sherbourne* (Charles I), *Bridg. Rep.* 35, *Leading Cases in Equity, White & Tudor*, Vol. II, pt. 2, p. 1738.

³² *Bruen v. Gillet* (1887), 115 N. Y. 10, 21 N. E. 676; *Colburn v. Grant* (1900), 181 U. S. 601, 45 L. ed. 1021.

³³ *Beven on Negligence*, 3d Ed., Vol. II, p. 1266.

govern him is much the same as the measure of care which is demanded of trustees and cotrustees.³⁴

Two American cases are found discussing the liabilities of cotrustees, one in 1877³⁵ by the Supreme Court of Massachusetts. Receivers were held to be jointly liable when one of them misappropriated the funds by using them for his own profit, and the other is guilty of gross neglect of his duties in giving no attention to the matter entrusted to his care and supervision.

The other case is in 1867,³⁶ by the Supreme Court of Illinois. Safford, one of the receivers, was held liable with his co-receiver because Safford by arrangement with his co-receiver took no active part in the running arrangement of the road. He was equally bound by the co-trustee's acts because, knowing of an injunction, and the limitation of the order appointing receivers, he had not used his efforts to prevent disobedience to the orders by his co-trustee or the employees of the receivers. From the facts as disclosed in these two cases the co-trustees held liable were guilty of some fault of omission or commission, and in so far as the decisions are in line with the doctrine of liabilities of co-trustees as laid down by *Colburn v. Grant*, 181 U. S. 601, the decision covering co-receiver's liabilities seems to be sound.

§ 810. Liability of Party Moving for Receivers. (a) General Rule. When a receiver accepts the appointment out of court on the terms contained in a debenture trust deed, or other out-of-court appointment, although called a receiver, he may be in reality an agent. He would not have to account to the court but to the persons who appointed him, and is, therefore, somebody's agent. Being an agent he is not personally liable if he orders goods in the name of his master, but his master is liable.³⁷ However, "What is the position of a receiver

³⁴ Lord Eldon, in *Massey v. Banner* (1820), 1 J. & W. 38.

³⁵ *Commonwealth v. Eagle Fire Ins. Co.* (1867), 96 Mass. 344.

³⁶ *Safford v. The People* (1877), 85 Ill. 558.

³⁷ *Owen v. Cronk* (1895), 1 Q. B. 265, at 272.

and manager appointed by the court? He is not the agent of the company. They do not appoint him; he is not bound to obey their directions and they can not dismiss him, however much they may disapprove of the mode in which he is carrying on the business. It is, of course, impossible to suppose that the relation of agent and principal exists between him and the court.³⁸ "It would be an extreme hardship in most cases to parties to an action, if they were to be held personally liable for expenses incurred by receivers and managers over which they have no control,"³⁹ It was, therefore, held in the latest English case that in an action for a dissolution of a partnership wherein a receiver was appointed by the court although with the consent of both parties the receiver could only look to the assets for indemnification and had no claim against the partners personally.⁴⁰

The American courts proceed along the same lines as the English decisions. A receiver, being an officer of the court, subject to its control and not to that of the party asking for his appointment, his fees and his expenses are chargeable solely against the fund which comes into his hands as receiver. Costs and administration expenses are to be taxed equitably.⁴¹ The parties to the action are not personally liable, therefore, unless they have given bond or other contract to pay them as a condition of the appointment or continuance of the receiver.⁴² There are apparent exceptions to the rule that parties moving for the appointment of a receiver are not liable for the fees and expenses of the receiver appointed.

The mere fact that the property in the hands of the receiver is insufficient to meet the expenses of the receivership does not

³⁸ Burt, Boulton & Hayward (1895), 1 Q. B. 276, at 279.

³⁹ Boehm v. Goodall (1911), 1 Ch. D. 155, at 161; Atlantic T. Co. v. Chapman (1907), 208 U. S. 360, 52 L. ed. 528, 28 S. C. Rep. 406. See 25 L. R. A. (N.S.) 418.

⁴⁰ Boehm v. Goodall (1911), 1 Ch. D. 155, at 161.

⁴¹ Palmer v. Texas (1908), 212

U. S. 118, at 132, 53 L. ed. 435, 29 S. C. Rep. 230; Kell v. Trenchard (1906), 146 Fed. 245; Elk Fork Oil & Gas Co. v. Jennings (1898), 90 Fed. 767.

⁴² Farmers Nat. B. v. Backus (1898), 74 Minn. 264, at 267, 77 N. W. 142; cited and approved, Atlantic T. Co. v. Chapman (1907), 208 U. S. 374, 52 L. ed. 528, 28

of itself render the plaintiff, at whose instance the receiver was appointed, liable for those expenses.⁴³

Courts of equity have a wide discretion in making and controlling allowances from the fund for services and expenses in conserving and administering a fund that has been brought into court. And when the appointment of a receiver is determined to be void or when the fund proves insufficient, it has been held that a court, in the exercise of its equity powers, may compel the party who procured the receiver to be appointed to pay into court a sum sufficient to pay the expenses of the receivership.⁴⁴

Says Peckham, J.:⁴⁵ "We do not decide that in all cases where an order appointing a receiver, or an order directing funds to be placed in his possession is reversed, no commissions can be allowed the receiver. There may be circumstances existing in any such case which would render it a matter of discretion whether or not to permit commissions, etc., to the receiver, and with its exercise we would have no right of review if not abused."

When a receiver is shown to have been appointed and continued through the fraud or illegal conduct of the parties asking for a receiver, such parties have been held liable for the receiver's fees and the fees of his counsel.⁴⁶

In Illinois it has been held when a complainant files a bill and causes a receiver to be appointed and then dismisses the bill, the defendant is entitled as a matter of right under sec. 18 of the Cost Act of Illinois to have the compensation of the receiver, including his solicitor's fees, taxed as costs against

S. C. Rep. 406; *Knickerbocker v. McKinley* (1896), 67 Ill. App. 293; *Cutter v. Pollock* (1898), 7 N. Dak. 631, at 634, 76 N. W. 235; *Farmers Loan Co. v. O. P. R. R. Co.* (1897), 31 Ore. 237, 48 Pac. 706.

⁴³ *Atlantic T. Co. v. Chapman* (1907), 208 U. S. 360, 28 S. C. Rep. 406; *Miller v. American L. & F. Co.* (1913), 181 Ill. App. 623, at 628. See 202 Fed. 330.

⁴⁴ *McIntosh v. Ward* (1907), 159 Fed. 66; *Capital City Tobacco v. Anderson* (1912), 138 Ga. 667, 75 S. E. 1040. See *West Riverside Water Co. v. Rogers* (1911), 16 Cal. A. 262, 116 Pac. 683.

⁴⁵ *P. N. Bank v. Bayne* (1893), 140 N. Y. 321, at 330, 35 N. E. 630. See 156 Fed. 743, and cases cited.

⁴⁶ *Miller v. American L. & F. Co.* (1913), 181 Ill. App. 623.

the complainant.⁴⁷ Following this decision it was held that when an appointment was improperly made and rents wrongfully collected, the fund is in court subject to the order of the chancellor and expenses incurred by the receiver and his claim for services and commissions should be charged against the complainant who procured the appointment of a receiver.⁴⁸

It has been held under a Texas statute that prohibits any person acting as a receiver who is interested in any way in the action for the appointment of a receiver, that the appointment of such a person was not a void appointment but voidable, and while the acts of the receiver were not invalid, nevertheless he was not entitled to compensation for services out of the fund.⁴⁹

(b) When Plaintiff in Main Case Fails to Recover. Where the appointment of a receiver is proper and legal, there seems to be no doubt that proper expenses of the receivership and his compensation shall be taken out of the fund. Furthermore, it does not always follow that because it is ultimately determined that the plaintiff or complainant is not entitled to recover, that the action of the court or the conduct of the parties in the appointment of a receiver has been irregular, improper, erroneous or unnecessary.⁵⁰

Said the Supreme Court of Iowa in 1904, and we quote with approval: "The general rule is well established that the expenses of the receivership are to be satisfied out of the property or funds coming into the hands of the receiver, and this rule is so universally accepted as the starting point for all discussion that authorities supporting it need not be cited. Where the object of the receivership is to preserve the property pending a determination of the rights of the parties to the litigation with reference to such property or the proceeds thereof, there is no question but that the successful party,

⁴⁷ *Burroughs v. Merrifield* (1910), 243 Ill. 362, 90 N. E. 750.

⁴⁸ *Rice v. McJohn* (1910), 244 Ill. 264, 91 N. E. 448.

⁴⁹ *Roberts Tel. v. Farmers, etc.*

(1913), Tex. Civ. App., 155 S. W. 629.

⁵⁰ *Ferguson v. Dent* (1891), 46 Fed. 88, at 98.

availing himself of the fruits of the litigation, must take subject to the burden of the costs of the receivership, and it is immaterial whether the plaintiff has succeeded in asserting the rights in aid of which the receivership has been asked, or whether the defendant has established the invalidity of plaintiff's claims. *Hirsch v. Israel*, 106 Iowa 498; *Hembree v. Dawson*, 18 Ore. 474, 23 Pac. Rep. 264; *Beckwith v. Carroll*, 56 Ala. 12; *Simmons v. Allison*, 119 N. C. 556, 26 S. E. Rep. 171; *Espuella Land, etc., Co. v. Biddle*, 11 Tex. Civ. App. 262, 32 S. W. Rep. 582.

"And the rule is properly applied where the contest is not as to the regularity or legality of the proceedings for the appointment of the receiver, but only as to the disposition of the proceeds of the property or funds. *Jaffray v. Raab*, 72 Iowa 335; *Radford v. Folsom*, 55 Iowa 276; *Harrington v. Foley*, 108 Iowa 287; *Gallagher v. Gingrich*, 105 Iowa 237; *St. Paul Title, etc., Co. v. Diagonal Coal Co.*, 95 Iowa 551; *Cutter v. Pollack*, 7 N. D. 631, 76 N. W. Rep. 235.

"But where the right of the plaintiff to subject the property for which he seeks to have a receiver appointed to the payment of his claim is resisted from the beginning, and the effect of the appointment of a receiver is to subject to the control of such receiver property in which the plaintiff is, as the result of the litigation, found to have had no interest or right whatever, it would evidently be unjust that after determination of the case against the plaintiff he should be allowed to have the expenses of the receivership which he has occasioned by his unfounded claim, and from which the opposite party derives no benefit, satisfied out of the property itself. Such a result would be inequitable, for it would throw upon defendant the burden of a litigation instituted by plaintiff without right." ⁵¹

⁵¹ *Frick v. Fritz* (1904), 124 Iowa 529, at 532, 100 N. W. 513. See like ruling in *Hawes v. First Nat. Bank* (1915), 229 Fed. 51, and cases cited; *Phillip v. Hudson Film Co.* (1913), 82 Misc. Rep. (N. Y.) 385, 143 N.

Y. S. 759, and cases cited. See *Sullivan v. Black* (1909), 159 Ala. 570, at 591, 48 So. 870. Where the complainant was wrongfully appointed receiver, the bill was improperly filed, and the respondents

(c) Where Not Sufficient Funds. Where there are no funds or not sufficient funds to pay the expenses of the receivership, an important question presents itself: Shall the expenses of the receivership, including compensation to the receiver, be paid at all?⁵² In the first place, the court when appointing the receiver and when explicitly or impliedly authorizing him to incur indebtedness, pledges the faith of the court that its officer will be paid his compensation and that the proper expenses of the receivership will be paid.⁵³

If there are no funds or insufficient funds to pay the receiver's fees and expenses, it generally follows that there are no funds to respond to plaintiff's claim. Someone should bear the liability and responsibility of bringing a suit and having a receiver appointed under such circumstances and the courts say that if the fund in court be not sufficient to afford adequate compensation to the receivers and indemnify for their proper expenses or payment for their properly incurred debts or contracts, then the parties at whose instance the receivers were appointed should be required to provide the means of payment.⁵⁴

The Colorado court has gone so far as to say that when the appointment is proper, if the fund seized is inadequate, the plaintiff who secures the appointment of a receiver and not the defendant whose property is wrongfully taken from him is liable for the legitimate expenses of such receivership.⁵⁵

(d) Where the Plaintiff Has No Interest in Receivership Property. If parties procure the appointment of a receiver as mere interlopers who have no interest in the subject-matter

have suffered damages by the appointment, yet receiver was allowed compensation out of the fund.

⁵² *Lammon v. Giles* (1887), 3 Wash. Ter. 117, at 123, 13 Pac. 417; *Batten v. Wedgewood* (1884), 28 Ch. D. 324.

⁵³ *Taft, J., in Mercantile T. Co. v. Kanawha* (1893), 58 Fed. 6; *Bank v. Central C. & C. Co.* (1902), 115 Fed. 878, at 879.

⁵⁴ *Torne v. King* (1885), 64 Md. 166, at 184, 21 Atl. 279; *Knickerbocker v. McKinley, etc.* (1896), 67 Ill. App. 291, at 295; *Ephriam v. Pacific Bank* (1900), 129 Cal. 589, at 592, 62 Pac. 177; *Welch v. Renshaw* (1900), 59 Pac. Rep. 967, 14 Colo. A. 526.

⁵⁵ *Hendrie v. Parry* (1906), 37 Colo. 365, 86 Pac. 113, and cases cited.

of the suit under any rem, the fees of the receiver and his expenses can not properly be taxed against the fund. But otherwise the court has discretion in allowing a receiver his fees or commissions and expenses out of the property, and a reviewing court ought not to interfere with that discretion, unless satisfied that it has been abused.⁵⁶

Where the appointment of a receiver of the rents and profits of mortgaged lands pending foreclosure is void as contrary to the laws of the state, though he renders services and realizes profits, he is not entitled to compensation out of the property, but, said the court: "The party who improperly procured the appointment of the receiver should have been required, if the receiver was entitled to anything, to pay his expenses and services."⁵⁷

§ 811. Intervention Proceeding Pro Interesse Suo. A court appointing a receiver acts as an arm of the sovereign. Its acts can-not be interfered with. Interference with the receiver performing his acts as receiver is interference with the court appointing him, and will not be tolerated.⁵⁸ A suit directed against the receiver as such is such an interference, and the early and late cases are in accord with the proposition that the bringing of such a suit is contempt of the court appointing the receiver.

A person having a claim against the receiver as such can bring a proceeding in the court appointing the receiver by intervening pro interesse suo and praying the court to lend

⁵⁶ *Hembree v Dawson* (1890), 18 Ore. 474, at 475, 23 Pac. 264. See dissenting opinion, *Clark v. Brown* (1902), 119 Fed. 131, at 133; *Howe v. Jones* (1885), 66 Iowa 156, 23 N. W. 376; *Frick v. Fritz* (1904), 124 Iowa 529, 100 N. W. 513; *Phillips v. Hudson* (1913), 143 N. Y. S. 759; *Torne v. King* (1885), 64 Md. 116; *P. N. Bank v. Bayne* (1893), 140 N. Y. 321, 35 N. E. 630; *Highley v. Deane* (1897), 168 Ill. 266, at

272; *Weston v. Watts*, 45 Hun 419.

⁵⁷ *Coupler v. Shirley* (1896), 75 Fed. 168, at 171. See *Weston v. Watts* (1887), 45 Hun 219; *Verplanck v. Insurance Co.* (1831), 2 Paige 438.

⁵⁸ *Russell v. The Ang. R. R. Co.* (1850), 3 Mac. & G. 116; *Noe v. Gibson* (1839), 7 Paige 513; *Wisswall v. Sampson* (1858), 14 How. 52; *Hills v. Parker* (1873), 111 Mass. 510.

an ear to the claim. Upon a proper case being presented the court will interfere, take cognizance of the case, and make a proper order on its receiver.

The courts of England have gone so far as to say that even if a receiver perform an act beyond the scope of his authority, the person aggrieved or prejudiced by the act of the receiver ought to make an application for such relief as he is entitled to in the action in which the receiver is appointed, and not without leave of court commence a fresh action to restrain the proceedings of the receiver.⁵⁹ He ought to apply in the receivership case to enforce his legal remedies.⁶⁰ Such proceedings were common in England and were common in America until the United States Congress and the legislatures of the various states passed laws enabling receivers as such to be sued without leave of the appointing court.⁶¹

§ 812. Termination of Official Liability. When a receiver has delivered over the funds or property in his possession pursuant to an order of the court whose officer he is, his official liability ends with the termination of his official existence and a judgment against him officially thereafter is unauthorized. This is because the court has deprived the receiver of the means whereby he could satisfy and discharge any judgment that might be rendered against him in his official capacity.⁶²

An order vacating an order appointing a receiver is in effect an order discharging the receiver, and such an order relieves the receiver and the party at whose instance he was appointed from liability on account of the receivership,⁶³ whereas the effect of an order abrogating an order appointing a receiver is to blot out the receivership as from the beginning

⁵⁹ Searle v. Choat (1884), C. A. 25 Ch. D. 723, at 727.

⁶⁰ Smith v. Earl of Effingham (1839), 2 Beav. 232.

⁶¹ See following paragraphs.

⁶² Hanlon v. Smith (1909), 175

Fed. 192, at 197, and cases cited; Smith v. Jones Lumber Co. (1912), 200 Fed. 647.

⁶³ Forrester v. Boston, etc., 24 Mont., 148, 60 Pac. 1088, 61 Pac. 309.

and leave the party who procured the appointment liable for the expense incurred over what it would have been if a receiver had not been appointed.⁶⁴

§ 813. Statutes Authorizing Suits against Receivers.⁶⁵ The courts of the United States and the various states have followed the rules and usages of equity long laid down by the English courts, holding that a receiver could not be sued without leave of the court having the custody of the res, and that all claims against the res must be adjudicated in that court.⁶⁶

In other words, it was early recognized and consistently adhered to by the courts of the United States that no liability could arise which would be enforceable at law against the receiver as such except as authorized by the order or permission of the court which appointed the receiver or by some statute authorizing such a liability made by the sovereign power.⁶⁷

Yet when railroads and other active businesses came to be managed by receivers and the receivers as such directly or through agents entered into activities and contracts in great number, then claims frequently arose against the management or the receiver or the receivership or whoever was thought responsible. In most cases it was but a matter of form to ask the appointing court to allow a suit to be filed, and in other cases, especially in a railroad covering much territory, it was somewhat of a hardship for the claimant to have to make request of the appointing court, when the claimant lived on the railroad at a distance from such appointing court.

Therefore, the United States Congress passed a statute⁶⁸ permitting suit against the receiver as well in respect of any act or transaction of his in carrying on the business connected

⁶⁴ *Thornton, etc., v. Bretherton*, 32 Mont. 80, 80 Pac. 10. Both above cases approved in *Taintor v. St. John* (1915), 50 Mont. 358, 146 Pac. 939.

⁶⁵ See ch. XXVI, "Suits Relating to Property in Receiver's Possession."

⁶⁶ *Davis v. Gray* (1872), 16 Wall. 203, at 218, 21 L. ed. 47.

⁶⁷ *Gray v. Grand Trunk Western Ry.* (1907), 156 Fed. 743.

⁶⁸ Act of March 3, 1887, amended March 7, 1911.

with such property, but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed, etc. Most of the states have passed statutes similar thereto.⁶⁹

§ 814. Statute of Limitation Does Not Run in Favor of Receiver. The position of a receiver is one in which liability to account would not easily be barred, and so long as he is living he must be held to have been a trustee of the money received, therefore the defense of statute of law is not a bar to a claim against him.⁷⁰ Money not accounted for and due from a receiver under the court is by his recognizance made a debt of record, although the balance due has not been ascertained. As to any money due from a receiver and not brought into account either by mistake or through fraud, the receiver would be a trustee for the persons entitled to that money.⁷¹

§ 815. Surcharging Accounts of Receiver. The law holds a receiver strictly responsible for property placed in the hands of a receiver and imposes upon him the duty of fully accounting for it. If the receiver is negligent in the management of the trust estate or has wasted its assets, he may be surcharged with the loss and such loss taken out of his commissions.⁷² When a receiver makes unauthorized purchases and does other unauthorized acts and incurs unauthorized liability, he may be obliged to return part or all of his compensation, and in addition personally to pay money into court covering liabilities.⁷³

⁶⁹ *Meara v. Holbrook* (1872), 20 O. S. 137, at 142; Ohio General Code, sec. 11897.

⁷⁰ *Seagram v. Tuck* (1881), 18 Ch. D. 299.

⁷¹ See *In re Cornish* (1895), C. A. 1896, 1 Q. B. 104.

⁷² *Pangburn v. American Vault, etc., Co.* (1903), 205 Pa. St. 93, 54 Atl. 508; *Schwartz v. Key Stone Oil Co.* (1893), 153 Pa. St. 283, 25 Atl. 1018; *Covington, Appellant, v.*

Hawes-La Anna Co. (1914), 245 Pa. St. 73, 91 Atl. 514.

⁷³ *Haines v. Buckeye Wheel Co.* (1915), 224 Fed. 289. See *Hitner v. Diamond State Steel Co.* (1913), 207 Fed. 616; *State v. Germania, etc., B.* (1908), 106 Minn. 539, 118 N. W. 686; *Tenth Nat. B. v. Smith Co.* (1913), 242 Pa. St. 269, 84 Atl. 76; *Villiers v. New Orleans Pure Milk Co.* (1909), 122 La. 718, at 743, 48 So. 162.

A receiver is not only chargeable with money actually collected by him, but he may be chargeable and may be surcharged with moneys due the estate which are collectible and which were not collected by the receiver or attempted to be collected by the receiver.⁷⁴

§ 816. Liability of Receiver's Surety. The obligation generally assumed by the surety or surety company which goes on a receiver's bond is that the receiver should faithfully discharge his duty as receiver to take charge of and safely keep and account for all of the assets of the estate and to abide by all orders of the court with reference thereto.⁷⁵

§ 817. Liability of Receiver for Losses in Running a Business. See secs. 780, 781, 789 and other appropriate sections of this chapter.

§ 818. Suit on Receiver's Bond. Demand upon a surety before bringing a suit on the receiver's bond is not necessary,⁷⁶ unless the contract of surety provides for a previous demand.⁷⁷ "The contract of suretyship is construed strictly both at law and in equity and the liabilities of the surety can not be extended by implication beyond the precise terms and scope of his engagement."⁷⁸

§ 819. Release of Receiver's Surety by Court under Statute. The weight of authority is that courts can not release a surety of an executor, guardian or trustee on a bond⁷⁹ unless by statute therein providing, and such statute must be strictly followed.⁸⁰ This doctrine has been applied to receivers. Un-

⁷⁴ Tenth Nat. Bank v. Smith Construction Co. (1913), 242 Pa. St. 269, 89 Atl. 76.

⁷⁵ Southwestern Surety Co. v. Pacific Coast Cas. Co. (1916), 92 Wash. 654, 159 Pac. 788.

⁷⁶ Ward v. Schlosser (1909), 111 Md. 528, at 535, 75 Atl. 116.

⁷⁷ Ward v. Schlosser (1909), 111 Md. 528, at 535, 75 Atl. 116, cit-

ing Nelson v. Bostwick, 5 Hill 37; Husband v. Vincent, 47 Ind. 211.

⁷⁸ Buckley v. House, 62 Conn. 459, at 470, 26 Atl. 352, cited in State v. Spittler (1907), 79 Conn. 470, 65 Atl. 949.

⁷⁹ Commonwealth v. Rogers (1886), 53 Pa. 470.

⁸⁰ Bellinger v. Thompson (1894),

less so released, a bond, once approved, remains operative as a security until its conditions are performed, or its penalty exhausted, or until barred by the statute of limitations.⁸¹

§ 820. Parties Dealing with Receiver Charged with Knowledge. Persons dealing with a receiver are charged with knowledge of his functions and powers and the orders and proceedings of the court appointing the receiver. They contract with the receiver at their peril.⁸² Of course the receiver may be guilty of fraud and deceit and be personally liable to those deceived or defrauded.

26 Ore. 320, 37 Pac. 714, 40 Pac. 229;
Dupont v. Mayo (1876), 56 Ga. 304;
Clark v. American Surety Co. (1898),
171 Ill. 235, 49 N. E. 481; Richter v.
Estate of Leiby (1898), 101 Wis.
434, 77 N. W. 745; Brooks v. Whit-
more (1886), 142 Mass. 399, 8 N. E.
117.

⁸¹ American Bonding Co. v. Hall
(1914), 57 Ind. App. 523, 106 N. E.
543.

⁸² Hendrie & Bolthoff Co. v. Parry
(1906), 37 Colo. 359, at 367, 86
Pac. 113.

CHAPTER XXX

PAYMENTS AND DISTRIBUTION BY RECEIVERS

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PAYMENTS

§ 821. Classification of Payments Out of Receivership Funds.

Before a receiver can properly make distribution of the funds in his hands to those whom the court finally declares are entitled to the same, he may be ordered by the court to make certain payments out of the funds, which payments may be broadly classified as follows:

First. Payments to the receiver as his remuneration for services in caring for the fund. These services are paid for out of the fund on a theory analogous to the theory on which a trustee's services are paid for out of the fund which he has under his care.

Second. Payments for services or expenses of realization. One of the purposes of appointing a receiver is to realize the property, that is, to make it available to the claimant or other parties to the suit. In theory, and generally in practice, the services and expenses of realization are performed for the benefit of those who ultimately become the distributees of the balance of the fund.

Third. Payments for services or expenses of preservation. One of the purposes of appointing a receiver is to preserve the property and make it available to the claimant or other parties to the suit, and services and expenses of preservation are in theory, at least, ultimately for the benefit of those who ultimately become the distributees of the balance of the fund.

Payment of taxes may properly be classified as a cost of preservation, although the sovereignty generally by statute has a lien on the property for taxes. If the payment of taxes was postponed until the final distribution the government might be looked upon as a distributee. But taxes become due periodically and are generally ordered paid by the receiver when they became due to avoid the penalty and avoid forfeiture to the government. Under this theory payment of taxes may properly be classified as a cost of preservation.

Fourth. Debts having priority by statute. The sovereignty may make laws regulating the ownership, sale, transfer and use of property within its boundaries and may declare that in the case of receivership, assignments, etc., labor performed during a certain period before such receivership, or assignment, shall have a priority in distribution.

There are "costs" in the main case, costs of actions brought by the receiver, receiver's counsel fees, auctioneer's fees, broker's fees, etc., and other payments made by the receiver, which, when analyzed, will usually be found to come under one of the above headings.

It is impossible to lay down a hard and fast rule as to the order of priority of payments to fit all cases and all circumstances. We have, however, in the following paragraphs and under appropriate headings, analyzed the various payments and indicated the rulings of courts as to their importance and priority.

§ 822. Payments by Receiver Must Be Authorized. The purpose of appointment of a receiver is to preserve and conserve or realize the property or fund, or the rents and profits of the same. When a receiver *pendente lite* is appointed, there must be some suit pending upon which to predicate the receivership. Until the suit is determined neither the fund nor the property, nor any part of it, can be properly applied to the payment of the claims made by the parties to the suit. Even when the suit is determined, the property or fund must

be equitably divided and frequently others share in it besides the original plaintiff and defendant. Since the property or fund is held by the receiver subject to the final determination of the suit, it naturally follows that the fund should be kept intact.

Nevertheless, in most receiverships, certain expenses of preserving and conserving and even realizing the funds or property will accrue and must of necessity be paid before the termination of the suit. Such payments, as well as all payments by the receiver, should only be paid when he is properly authorized thereto by the court, or in a few instances, when absolutely necessary to the protection of the trust to pay the same without direct authorization, but with a confirmation or ratification by the court after such unusual payments are made.¹

It was early held that a receiver should pay out nothing without an order of court,² or make any agreement relative to the funds in his hands without authority of the court express or implied.³ It has been later held that the Chancery Court of England will not permit a receiver to pay out more than a very small sum at his own discretion.⁴ A receiver and manager should not advance money without applying to the court for authority to do so, in which case in England he will generally be allowed five per cent. on the sum which the court authorizes him to advance, and the court will give the receiver a charge on the assets for that sum and interest.⁵

§ 823. Incurring of Expenses by Receiver. The general rule governing the incurring of expenses by the receiver is as follows: "A receiver is not authorized, without the previous direction of the court, to incur any expenses on account of

¹ *Tinsley v. Etowah Power Co.* (1912), 197 Fed. 602, at 609; *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287, 34 L. ed. 408, 10 S. C. Rep. 1019.

² *Fletcher v. Dodd* (1789), 1 Ves., Jr., 85.

³ *Chicago Deposit Vault Co. v.*

McNulta, 153 U. S. 554, and authorities cited, 38 L. ed. 819, 14 S. C. Rep. 915; *Stone v. Trust Co.* (1914), 183 Mo. App. 261, at 278, 166 S. W. 1091.

⁴ *Waters v. Taylor* (1807), 815 Ves., Jr., 25.

⁵ *Ex parte Izard* (1883), C. A. 23 Ch. D. 80.

property in his hands beyond what is absolutely essential to its preservation and use as contemplated by his appointment.”⁶

Due regard must always be had, not only to the nature and surroundings of the property in the custody of the receiver, but to the exigencies of the moment when he may be required to take action involving the safety of the property in his charge. It is impossible to lay down a rule which will be absolutely satisfactory in the matter and fit every case.

However, it is said in *Brown v. Hazelhurst*, 54 Md. 26, at 28, and quoted in *Thompson v. Phoenix Insurance Co.*, 136 U. S. 289, at 295: “There is no doubt of the general rule, and it is a wholesome one, that a receiver will not be permitted to lay out more than a small sum at his own discretion, in the preservation or improvement of the property under his charge, but he should in all cases where it is practicable, or the circumstances of the case will permit, before involving the estate in expense, apply to the court for authority for so doing. But this general rule, however salutary it may be, should not be so rigidly and sternly enforced as to work wrong and injustice where the receiver has acted in good faith and under such circumstances as will enable the court to see that if previous authority had been applied for, it would have been granted. The justice and right of the matter must depend to a great extent upon the special circumstances of each case that may be presented.”

It follows from necessity, in order to accomplish the effectual administration of the trust assumed by the court, that the expenses should be paid out of the income, or when necessary, out of the corpus of the property before distribution, or before the court passes over the property to those adjudged to be entitled.⁷

⁶ *Thompson v. Phoenix Ins. Co.* (1890), 136 U. S. 287, 34 L. ed. 408, 10 S. C. Rep. 1019; *Tinsley v. Eto-wah Power Co.* (1912), 197 Fed. 602, at 609; *Cowdry v. Galveston, etc.* (1876), 93 U. S. 354, 23 L. ed. 950; *Burroughs v. Toxaway Co.* (1910), 182 Fed. 129, at 137; *Huff v. Bid-*

well, 151 Fed. 563. See *Union Trust Co. v. Illinois* (1885), 117 U. S. 434, 29 L. ed. 963, 6 S. C. Rep. 809; *Hitner v. Diamond State Steel Co.* (1913), 207 Fed. 616.

⁷ *Raht v. Attrill* (1887), 106 N. Y. 423, 13 N. E. 282; *Hanna v. State Trust Co.* (1895), 70 Fed. 2.

Application for the payment of expenses should properly be made by the receiver to the court; nevertheless, one having supplied credit, money or property to the trust fund may apply to the court to be made a party to the cause and set up his claim direct by a proceeding *pro interesse suo*.

§ 824. Payments of Fiduciary Obligations. It frequently happens that a receiver takes possession of property or funds which apparently belong to the defendant, but which upon investigation are found to have been held by such defendant in a trust capacity, that the defendant acted as to them in a fiduciary relationship, and that the relation of debtor and creditor did not exist. In many cases as will be shown hereafter, the court will order such money, funds or property to be returned to the claimant by summary action.⁸

In such case it can not be strictly said that the claimant has a preferred claim against the assets of the defendant or has a priority to be paid out of the assets, but that he owns or has an equitable title to certain of the assets and that they were held by the defendant in a trust capacity. The creditors of defendant, under proper proceedings, are entitled to appropriate and realize the defendant's property with certain charges against it, but as to the property held by defendant in a fiduciary relationship, that property is not in fact the defendant's property.⁹ It is not absolutely necessary to find the property in the same form as received by the trustee.^{9a}

It is a rule of equity jurisprudence perfectly well settled and of universal application, that where property held upon any trust to keep or use, or invest in a particular way, is misapplied by the trustee, and converted into different property, or is sold and the proceeds are thus invested, the property may be followed wherever it can be traced through its trans-

⁸ *Eames v. H. B. Chafin Co.* (1915), 220 Fed. 190.

⁹ *Manning v. Fisher* (1894), 62 Fed. 958, at 959.

^{9a} See *United States & Mex. T. Co. v. Kansas City M. & O. Ry. Co.* (1917), 240 Fed. 511.

formation, and will be subject, when found in its new form, to the rights of the original owner or cestui que trust.¹⁰

Said Mr. Justice Shiras:¹¹ "The foundation of the right on the part of the owner of a trust fund to a preference over general creditors in payment out of a fund or estate that has passed to the assignee or receiver of an insolvent person or corporation is, that the trust fund has been wrongfully confused or intermingled with the property of the insolvent, or has been used to increase the value of property, thereby increasing the amount or value of the funds or estate passing into possession of the assignee, or receiver; that, if this intermingling had not taken place, the fund passing to the receiver would have been so much less; that creditors have only the right to subject the property of the debtor to the payment of their claims, and therefore the creditors can not complain if the total fund coming into the hands of the receiver is reduced by the amount necessary to make good to the owner of the trust fund the sum which was wrongfully used in augmenting the fund or property passing to the receiver. Unless it appears that the fund or estate coming into possession of the receiver has been augmented or benefited by the wrongful use of the trust fund, no reason exists for giving the owner of the trust fund a preference over the general creditors."¹²

Said Sanborn, C. J., speaking for the Circuit Court of Appeals, Eighth District:¹³ "It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment by a receiver out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came into the hands of the receiver and then the claim can be sustained to that fund or property

¹⁰ Cook v. Tullis (1873), 18 Wall. 332, 21 L. ed. 933. See Love v. North American Co. (1915), 229 Fed. 103, at 107; United States & Mexican Trust Co. v. Kansas City M. & O. Ry. Co. (1917), 240 Fed. 505.

¹¹ Circuit Court of Appeals, Eighth District (1898).

¹² Beard v. Independent Dist. of Pilla City (1898), 88 Fed. 375, at

379, cited and approved in American Can Co. v. Williams (1910), 178 Fed. 420, at 424. See Central Trust Co. v. Chicago H. & N. Ry. Co. (1916), 232 Fed. 936, at 943, cases cited.

¹³ Empire State Surety Co. v. Carroll County (1912), 194 Fed. 593, at 604.

only and only to the extent that the trust property or its proceeds went into it.

"It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came to the hands of the receiver." ¹⁴

So it has been held that an insurance agency neither before the appointment of a receiver for such agency, nor afterward, had any proprietary right or interest in premiums except to the extent of commissions for collections, pursuant to the terms of the agency contract. Therefore the collections made by the receiver of the insurance agency so far as they arose from premiums due on policies and bonds were and remained the money of the principals, not of the agency. It could not lawfully appropriate them to its personal use and benefit. They constituted a trust fund for the exclusive use and benefit of the companies, the cestuis que trustent previously represented by the agent. Such funds should not go to the general creditors of the agency. ¹⁵

The general rule as established by the authorities may be stated as follows: Where one person receives into his hands the funds of another, he is deemed to hold them in a fiduciary capacity, such as bailee or trustee, unless they were so received with the understanding, express or implied, that the same should be turned into a debt. ¹⁶

A difficult question arises when the trust funds or property themselves have been dissipated. It may be that none of the original funds or property actually reach the hands of the

¹⁴ *Empire State Surety Co. v. Carroll County* (1912), 194 Fed. 593, at 604, and cases cited.

¹⁵ *Williams v. S. M. Smith Ins. Agency* (1915), 75 W. Va. 494, 84 S. E. 235; *Sales Commissions Cases, Scully v. Colean Mfg. Co.* (1911), 160 111 App. 286. See *In re Brown & Co.*, 189 Fed. 432; *National Bank v. Ins. Co.*, 104 U. S. 54, 26 L. ed. 693; 1 *Clark & Skyles on Agency*,

sec. 421, at 429; *Baker v. Bank*, 100 N. Y. 31, 2 N. E. 452.

¹⁶ *Libby v. Hopkins* (1881), 104 U. S. 307, 26 L. ed. 769; *Rose v. Hart* (1818), 8 Taunt. 499; *People v. Bank of Rochester* (1884), 96 N. Y. 32; *People v. Bank of Danville* (1886), 39 Hun 187, at 190. See *Isaac McLean Sons Co. v. William S. Butler Co.* (1913), 208 Fed. 730.

receiver. It is held in a recent case, as follows: "When the proceeds of the trust property found its way into the defendant's hands and was used by him either to pay off his debts or increase his estate, in either case it would go to the benefit of his estate and in that event the cestui que trust was entitled to a like amount from the assignee." ¹⁷

Payment of Fiduciary Obligations on Summary Petition.

When it is claimed that the receiver has funds in his hands which were held by the defendant as trustee, it is not always necessary for the claimant of those funds, the cestui que trust, to file a plenary suit, but such claimant should ask leave to file an application in the receivership cause. If none of the facts set forth in the petition or application are denied by the receiver, it would seem that the cestui que trust and the receiver should be spared the necessary delay and expense of a plenary suit, that the rights of all the parties would be properly protected by such a summary proceeding and if the proper showing is made the court should make an order to the receiver to deliver over the property or funds.¹⁸

§ 825. Return of Property to Real Owner.¹⁹ When a receiver obtains property belonging to a third party other than the defendant, property against which neither the plaintiff nor the defendant in the suit has any claim, he is bound to return such property or its proceeds to the real owner upon the proper order being made by the court appointing the receiver.²⁰ It has been held that in a case where a corporation held a note payable to itself, yet really owned by a third party, and such corporation becomes insolvent, its effects passing to a receiver, such receiver may indorse the note to the real owner.²¹

¹⁷ *McLeod v. Evans* (1886), 66 Wis. 401, at 409, 28 N. W. 173, at 214.

¹⁸ *People v. Bank of Danville* (1886), 39 Hun 190; *Matter of Le Blane* (1878), 14 Hun 8; affirmed (1878), 75 N. Y. 598; *A. H. Alden* (1913), 142 N. Y. S. 772, at

773. See *In re Peters* (1912), 139 N. Y. S. 952.

¹⁹ See this chapter, sec. 824, *supra*, "Payment of Fiduciary Obligations."

²⁰ *McGill v. Brown* (1913), 72 Wash. 514, 130 Pac. 1142.

²¹ *Gibson v. Gutin* (1909), 83 Neb. 718, 120 N. W. 201.

§ 826. Payment of Receiver's Fees. Ought the receiver to be paid before it can be said that there is anything to distribute in the payment of costs or anything else? "In my opinion that is the receiver's position. He is the officer of the court and the court is bound to see that he is paid," said Pearson, J., of the English Chancery Court.²² The rule generally acted upon is that the receiver's remuneration and costs shall be paid before distributing the assets.²³

When a court takes the custody of property and appoints a receiver to manage and care for it, the court in a large sense acts as trustee for the property, and the receiver, although the officer of the court is not its agent in the strict sense of the word, yet in a large sense he acts as the agent of the court to manage the estate in the court's hands. The moneys due and collected by the receiver are moneys due the court itself and when the court has in its hand moneys belonging to the estate, on account of which it makes payments, it must have a right to repay itself out of these moneys. The court when collecting its fees out of the moneys in its hands, in fact collects them for its officer or receiver. The right of this court and its officers to fees has priority over the costs of the suit, and is analogous to the right of a trustee, to his charges and expenses, which must be a first charge on the fund.²⁴

The rule may be different where the order appointing the receiver has been set aside and the property restored to the owner.²⁵ As to what a reasonable fee is, no iron-clad rule can be laid down. The amount of work done by the receiver must, of course, be taken into consideration, the quality of the work, and the amount of funds passing through the hands of the receiver, and the magnitude of the case, and the responsibility imposed.^{25a}

²² Pearson, J., in *Batten v. Wedgewood* (1884), 28 Ch. D. 324.

²³ *Batten v. Wedgewood* (1884), 52 L. T. Rep. 213.

²⁴ *Morison v. Morison* (1855), 7 DeG. M. & G. 226.

²⁵ *Radford v. Folsom* (1880), 55 Iowa 276, at 287, 7 N. W. 604; *Gallagher v. Ginrich, et al.* (1898), 105 Iowa 237, at 339, 74 N. W. 763.

^{25a} *Eames v. H. B. Claffin Co.* (1916), 231 Fed. 693.

Receiver's debts for service and advances of other persons for the benefit of the trust, and receiver's services themselves, in a New Jersey case, were held to stand on the same plane. "They are all equally debts or claims which should be paid out of the trust funds, as expenses of the receivership, and if the fund is not sufficient to pay all in full, then they must be paid pro rata. If the receivers desire or intend to claim a preference in payment for their own compensation, they must apply to the court, not only for such order, but also for the authority to incur indebtedness, which will be subject to their claim. Upon such application, the court can, by proper inquiry into the condition of the estate, make the orders necessary to control its receivers in the incurring of indebtedness, and also to give notice to persons dealing with the receiver's for services to the trust that the receiver's personal claims for services are preferred." ²⁶

(a) Amount of Receiver's Fees. No strict rule can be laid down fixing the exact amount that should be allowed a receiver as commissions or fee. A number of cases allow five per cent. upon the receipts and disbursements of a business as a fair remuneration.²⁷ Yet ten per cent. has been allowed and not set aside by the upper court ²⁸ because a number of considerations were present which might entitle the receiver to more than five per cent., and the upper courts are not disposed to set aside the judgment of the master and the lower court as to the amount.²⁹

The amount to be allowed is within the discretion of the court appointing the receiver,³⁰ although an abuse of discretion or a refusal of the court to allow any commissions or fees may be reviewed by the upper court.³¹ For the services of

²⁶ *Nessler v. Industrial Land, etc.* (1903), 65 N. J. Eq. 491, at 494, 56 Atl. 711.

²⁷ *Cake v. Mohun* (1896), 164 U. S. 311, at 318, 41 L. ed. 447, citing *Stretch v. Gowdey*, 3 Tenn. Ch. 565; *In re Receivership of Farmers Union, etc.* (1914), 133 La. 970, 66 So. 315.

²⁸ *Cake v. Mohun* (1896), 164 U. S. 311, at 318, 41 L. ed. 447.

²⁹ *Cake v. Mohun* (1896), 164 U. S. 311, at 318, 41 L. ed. 447.

³⁰ *In re Bank of Newcastle* (1907), 89 Pac. 1035, 15 Wyo. 501; *Campbell v. Charlestown St. Ry. Co.* (1914), 80 S. E. 809, 72 W. Va. 493; *Haehnlen v. Drayton* (1911), 192 Fed. 300, at 306.

³¹ *Campbell v. Charlestown St. Ry. Co.* (1914), 80 S. E. 809, 73 W. Va. 493.

receiver the law recognizes the justice of compensation measured by the circumstances of the case. Fifteen thousand dollars was allowed the receiver of a brewery under the circumstances therein stated.³²

(b) Contribution to Receiver's Fees by Lienholders. Where there are valid liens on the property of which a receiver takes possession, the mere fact of the appointment, or even the order of the court authorizing the receiver to conduct a business, do not of themselves give to obligations which he might incur or give to his claim for compensation a preference over prior liens. This statement holds good as to ordinary property, but is not strictly true as to railroad and other quasi-public property. In other than such railroad or other quasi-public receiverships, the security should not be impaired. If the security is sufficient so that there is no margin of value in the property for the general creditors, the court should hesitate to appoint a receiver on application of general creditors, or to continue the receivership after lienholders have had an opportunity to protect their interests.³³

If the lienholders adopt the existing receivership as a means of collecting their debts, and do not with reasonable promptness pursue their own remedies after the appointment of receivers, they should bear their part of the expenses of the receivership including compensation of the receiver for himself and his counsel. If the lien creditor within a reasonable time uses other methods of enforcing his lien, and the property theretofore in the care of the receiver is sold in that proceeding for less than the lien debt, then it is material to consider what benefit the receivership was to the lien creditor prior to the sale by the lienor.³⁴ Lienholders of quasi-public corporations take their security knowing that a receiver may be appointed and his pay may come out of the property,³⁵ and to a limited

³² *Pramuk's Appeal* (1915), 250 Pa. St. 45, at 49, 95 Atl. 326. \$33,000 allowed in *Eames v. Claffin Co.* (1916), 231 Fed. 693.

³³ *Central T. Co. v. Chester, etc.,*

Ry. (1911), 80 Atl. 801, 9 Del. Ch. 247.

³⁴ *Central T. Co. v. Chester, etc., Ry.* (1911), 80 Atl. 801, 9 Del. Ch. 247.

³⁵ See sec. 863, *infra*.

extent expenses of receivership may be charged against the corpus when the income is insufficient.³⁶

(c) Burden of Proof on Receiver Asking for Fees. When exceptions are made to the allowance of counsel fees or commissions and of expenses of the receiver, it has been held that the burden is upon the receiver to show that the payments were reasonable, and it was his duty to make proof of the services rendered and to show the face value of the time and labor actually required in the discharge of those services. The presentation of a bill containing a series of unitemized charges in lump sums of considerable amounts was not sufficient.³⁷

(d) Receiver's Compensation Surcharged. When a receiver does not give proper attention to the conduct of a business, neglects and mismanages it, he may be refused compensation for his services.³⁸ The receiver may be surcharged with various sums.³⁹ Receiver may be surcharged with amount of fees he has taken out beyond what is proper or reasonable,⁴⁰ and for fees taken out or charged for services that were of no benefit to the estate⁴¹ or exorbitant,⁴² and for improper payment of a wage claim.⁴³

"A receiver is not only chargeable with moneys actually received by him, but is equally chargeable and will be surcharged where moneys are due to the estate which are collectible and which have not been collected or attempted to be collected by him."⁴⁴

³⁶ *Central T. Co. v. Chester, etc.*, Ry. (1911), 80 Atl. 801, 9 Del. Ch. 247.

³⁷ *Commonwealth v. Monongahela Val. Bank* (1913), 239 Pa. St. 254, at 258, 86 Atl. 719.

³⁸ *Pangburn v. American Vault S. & L. Co.*, 205 Pa. 93, 54 Atl. 504, at 508; *Schwartz v. Keystone Oil Co.*, 153 Pa. St. 203, 25 Atl. 1018; *Covington, Appellant, v. Hawes-LaAnna Co.* (1914), 245 Pa. St. 73, at 77, 91 Atl. 514.

³⁹ *Covington, Appellant, v. Hawes-LaAnna Co.* (1914), 245 Pa. St. 73, at 77, 91 Atl. 514.

⁴⁰ *Pramuk's Appeal* (1915), 250 Pa. St. 45, 95 Atl. 326.

⁴¹ *Tenth Nat. Bank v. Smith Construction Co.* (1913), 243 Pa. St. 269, 89 Atl. 76.

⁴² *Commonwealth v. Monongahela Val. Bank* (1913), 239 Pa. St. 254, at 258, 86 Atl. 719.

⁴³ *Pramuk's Appeal* (1915), 250 Pa. St. 45, 95 Atl. 326.

⁴⁴ *Tenth Nat. Bank v. Smith Construction Co.* (1913), 243 Pa. St. 269, at 288, 89 Atl. 76; *Higgins v. Shields* (1912), 151 Ky. Rep. 212, 151 S. W. 391.

(e) **Notice of Application for Fees by Receiver.** Said Mr. Justice Lurton, then of the United States Circuit Court of Appeals of the Sixth Circuit, as follows: "Nothing is better settled than that an allowance to a receiver by way of compensation for his services is not subject to the arbitrary determination of the court, but should be made upon a hearing at which the parties interested have an opportunity of contesting the claim."⁴⁵

§ 827. Payment of Taxes—Generally. Property in the hands of a receiver is in custodia legis, but it is not thereby rendered exempt from the imposition of taxes by the government within whose jurisdiction the property is,⁴⁶ and the lien for taxes is superior to all other liens whatsoever except judicial costs. While a lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done, and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face.⁴⁷

Taxes are generally a lien against real estate by statute, and as a rule lienholders are paid upon distribution of the funds in the hands of a receiver. Taxes, however, are payable periodically, generally twice a year, and are generally ordered paid by the receiver. Failure to pay them may cause a forfeiture of the property or a penalty. Therefore, the payment of taxes may properly be classified as a cost of preservation. In New York state, it has been held that a tax lien is subject to the general expenses of the receivership and before taxes.

⁴⁵ *Ruggles v. Patton* (1906), 143 Fed. 312, at 314, citing *In re Michigan C. Ry.*, 124 Fed. 727, 59 C. C. A. 643.

⁴⁶ *Coy v. Title Guarantee & Trust Co.* (1914), 212 Fed. 520; affirmed *Coy v. Title Guarantee & Trust Co.* (1915), 220 Fed. 90; *Ex parte Chamberlain*, 55 Fed. 704; *In re*

Pleasant Hill L. Co. (1910), 126 La. 743, at 766, 52 So. 1010; *Greeley v. The Provident Sav. Bank* (1889), 98 Mo. 458, at 460, 11 S. W. 980; *Hanna v. State Trust Co.* (1895), 70 Fed. 2, at 9.

⁴⁷ *In re Tyler* (1893), 149 U. S. 164, at 183, 37 L. ed. 689.

are paid, a sufficient sum to satisfy those charges should be reserved by the receiver.⁴⁸ A receiver is a quasi trustee and the court administering the property is a quasi trustee. Trustees are paid for handling funds even for the government. If a receiver and court bring a fund into court and make it available for payment of taxes the proper expenses of this receiver and the court costs ought to be paid

Where land or other property is under the control of a court of equity, the ordinary statutory remedies for the enforcement of taxes levied upon or payable in respect of such property are suspended, and payment must be secured through the power and authority of the equity court.⁴⁹ It is the duty of the receiver to ask for an order of court to pay the taxes. If they are not paid it is the duty of the taxing authorities to take the initiative and make proper application to the appointing court for their payment.⁵⁰

“The appointment of a receiver and the taking of property into the hands of the court through its officer does not withdraw it from taxation. It remains subject to assessment and to the payment of all legal taxes thereon while in custodia legis to the same extent as it was while in the possession of the owner.”⁵¹

Distribution of funds in custodia legis should not be made until provision is made for the payment of taxes and levies due to the state and its municipalities.⁵²

“And whether or not such taxes be a lien or a debt by the laws of the government within whose jurisdiction the property is situated, such taxes are and should be regarded by the courts as a preferred and paramount claim over all other claims, for they are essential to the existence and maintenance of the very government under which the property is acquired and

⁴⁸ *In re Atlas Iron Const. Co.* (1897), 46 N. Y. S. 467.

⁴⁹ *Blakestone v. State* (1912), 117 Md. 237, at 245, 83 Atl. 151.

⁵⁰ *Blakestone v. State* (1912), 117 Md. 237, at 245, 83 Atl. 151.

⁵¹ *Coy v. Title Guarantee & T. Co.* (1915), 220 Fed. 90, at 92.

⁵² *Taylor v. Sutherland Mead & Co.* (1908), 107 Va. 787, at 787, 60 S. E. 132.

protected.”⁵³ Judicial costs may, however, take precedence over such payment of taxes.⁵⁴

By Ohio General Code, sec. 5370, Revised Statutes, sec. 2734, * * * “the property of corporations whose assets are in the hands of receivers shall be listed by receivers.”

Such receivers must, therefore, list personal property for taxation, but “receivers for partnership concerns whose affairs are to be wound up and dissolved are not named.”⁵⁵

Therefore, the ruling just quoted⁵⁶ is authority in Ohio, for the statement that receivers for corporations, but not receivers for firms or individuals, are required to list personal property for taxation. The argument which the Ohio court employs in this case against taxing such property is that equitably, the property is vested in the creditors, and if listed by the receiver, is in effect to hold that creditors must be taxed twice on the same value.

The conclusion to be reached from *McNeill v. Hagarty*, as far as Ohio law is concerned, is that real estate in the hands of a receiver is taxable because of the tax lien. Personal property of a corporation is taxable because the statute, General Code, sec. 5370, makes it the duty of the receiver to list it. But there is no duty directly imposed on a receiver other than a receiver of a corporation to list personal property, and there is no lien for taxes on the personal property until seized, therefore judicial costs and liens must come before taxes on personal property, in the hands of such receiver, if such taxes had been assessed before the receiver took charge. If they had not and the receiver was not obliged to list such taxes, then it would follow, if *McNeill v. Hagarty* is followed, that personal prop-

⁵³ *Coy v. Guarantee & Title Co.* (1915), 220 Fed. 90, at 92; *Taylor v. Sutherland, etc., Co.* (1908), 107 Va. 787, 60 S. E. 132, at 136; *Greeley v. The Provident, etc.* (1889), 89 Mo. 458, at 460, 11 S. W. 980; *Hamilton v. David C. Beggs Co.* (1909), 171 Fed. 157. See *Hanna v. State Trust Co.* (1895), 70 Fed. 2, at 9; *Bear River Paper and Bag Co. v. City of Petoskey* (1917), 241 Fed. 53.

⁵⁴ *First Nat. Bank v. Ewing* (1900), 103 Fed. 168; *Coy v. Guarantee & Title Co.* (1915), 220 Fed. 90, at 92, citing *Cooley on Taxation*, 3d Ed., Vol. 2, p. 834.

⁵⁵ *McNeill, Assignee, v. Hagarty* (1894), 51 O. S. 255, at 266, 37 N. E. 526.

⁵⁶ *McNeill v. Hagarty* (1894), 51 O. S. 255, at 266, 37 N. E. 526.

erty in the hands of a receiver is not taxable while in his hands, unless he is the receiver of a corporation, that is, in Ohio. The decisions and statutes of other states must be carefully investigated. It is impossible to cover all of them in the volume.

Assessment of Taxes in Name of Receivers. Under sec. 3647 of the Political Code of California, it has been held that a receiver was properly designated as "receiver or depository" under order of court of the impounded moneys in equity suits, and the banks being receivers of the court, the money on deposit with them under the order and direction of the court was properly assessable to them as such receivers, and assessments thereon were regular and legally made.⁵⁷ If the assessments were regular the court was authorized to direct the receiver to pay the taxes levied.⁵⁸

Whilst it should be assessed to the receiver⁵⁹ yet the fact that it is assessed in the name of the party from whom the receiver holds possession does not affect the validity of the tax.⁶⁰

A receiver may list personal property belonging to the defendant under the statutes of some states.⁶¹

§ 828. Payment of Taxes Due before Receivership. (a) On Real Property. Taxes on real estate and personalty are not a lien unless made so by statute and when created the lien is not to be enlarged by construction.⁶² Many states make taxes a lien on real estate beginning at a certain fixed date of each year. When taxes are made a lien upon real estate

⁵⁷ *Spring Valley W. Co. v. City & County of San Francisco* (1915), 225 Fed. 728, at 732.

⁵⁸ *Spring Valley W. Co. v. City & County of San Francisco* (1915), 225 Fed. 728, at 732; *Los Angeles v. Los Angeles City Water Co.*, 137 Cal. 699, 70 Pac. 770.

⁵⁹ *Schmidt, Treas., et al., v. Frailey, Rec.* (1897), 148 Ind. 150, 47 N. E. 326; *Spalding v. Commonwealth*, 88 Ky. 135, 10 S. W. 420; *Central Trust Co. v. Wabash Ry.*, 26 Fed. 11; *New Jersey, etc., Ry. v. Board*, 41 N. J. L. 235.

⁶⁰ *Wiswall v. Kunz* (1898), 173 Ill. 110, 50 N. E. 184.

⁶¹ *Cobbey's Am. St. of Nebraska* (1911), No. 10927; *Midland Guarantee, etc., v. Douglas Co.* (1914), 217 Fed. 358, at 362.

⁶² *New England L. & T. Co. v. Young* (1890), 81 Iowa 732, at 738, 46 N. W. 1103; *Cooley, Taxation*, 444; *Jaffray v. Anderson*, 66 Iowa 719, 24 N. W. 527. See *In re Pleasant Hill L. Co.* (1910), 126 La. 743, at 766, 52 So. 1010.

by the laws and decisions of the states they become prior and superior to all mortgage and judgment liens.⁶³

In such cases the appointment of a receiver does not directly affect the lien although it does prevent the state from selling the property or otherwise collecting the tax except through the court appointing the receiver.

(b) On Personal Property. Taxes on personal property are not generally a lien,⁶⁴ until distraint therefor is made in the mode pointed out in the statutes. Therefore under such statutes a mortgagee of personal property who takes possession under his mortgage and sells the property either directly or through the decree or order of a court before distraint is made, is entitled to the proceeds so far as may be necessary to pay his claim, as against taxes assessed against the mortgagor.⁶⁵

So a claim for taxes against personal property which has gone into the hands of a receiver is not a lien claim unless the state laws make it such. If the state has such a lien for taxes on personal property, it may take precedence and be paramount over other liens made prior or subsequent to such tax lien.⁶⁶

If the state has no lien for personal property for taxes accruing before the appointment of a receiver, then the state may come in as an ordinary creditor⁶⁷ or have a priority in distribution of the general funds either by special statutes or on equitable principles. Property in custody of the court can not be levied upon and taken out of the possession of the receiver even by an officer of the sovereignty without such officer being in contempt of court.⁶⁸ A lien for taxes will be

⁶³ *New England L. & T. Co. v. Young* (1890), 81 Iowa 732, at 740, 46 N. W. 1103; *Jenkins v. Newman*, 122 Ind. 99; *Kerr v. Hoskinson*, 47 Pac. 172, 5 Kan. App. 193; *Fleckenstein v. Baxter*, 114 Mo. 493, 21 S. W. 852; *Jack v. Wiennett* (1885), 115 Ill. 105, at 110, 3 N. E. 445. See *Hanna v. State Trust Co.* (1895), 70 Fed. 2, at 9.

⁶⁴ *Marsh v. Bird* (1884), 22 Fed. 180.

⁶⁵ *Marsh v. Bird* (1884), 22 Fed. 180.

⁶⁶ *State of Minnesota v. Central T. Co.* (1899), 94 Fed. 244.

⁶⁷ *Jackson C. & C. Co. v. Phillip Line* (1912), 75 S. E. 681, at 684, 114 Va. 40.

⁶⁸ *Greeley v. The Provident Sav. Bk.* (1889), 98 Mo. 458, 11 S. W. 980; *In re Tyler* (1892), 149 U. S. 164, at 181, 37 L. ed. 689.

Contra, *In* 1907 Archibald, then

recognized and enforced, but under the sanction of the court appointing the receiver.⁶⁹

§ 829. Payment of Taxes Assessed after Receivership. (a) On Real Property. After real property has gone into the hands of a receiver a lien may attach by statute as well as before the receivership, and such lien may be paramount over all other liens. The tax-collecting authorities, by reason of the custodia of the court, have no longer the right to come in and sell the property except by order of the appointing court. If the sale of the property is made, however, by the court appointing the receiver, the funds derived from the sale of the property must pay the proper proportion of the realization costs. The court will apportion such costs equitably, and there may be cases where the taxes which would otherwise be paid in full must pay their proportion of the costs of realization, but it would seem not the costs of the general receivership.

(b) On Personal Property. If taxes on personal property accruing before a receivership are not a lien until distraint is made, then because no distraint can be made after a receivership, it follows that no lien in such cases can attach for personal taxes on property in custodia legis.⁷⁰ Property in the hands of a receiver is liable for taxation and subject to assessment even though in a strict technical sense when such taxes are first

United States Judge of the Western District of Pennsylvania, said in *Gutterson & Gould v. Lebanon Iron & Steel Co.*, 151 Fed. 72, at 75: "Taxes past and current which had to be paid on personal property would be liable to be levied upon and which the receivers therefor properly took care of in order to protect it without any order." The author of this work respectfully submits that no levy can be made without leave of court upon funds in the hands of a receiver in such a way as to take the property out of the receiver's possession. A levy carried so far as to accomplish a dis-possession of the receiver would be

a contempt of the court appointing the receiver.

See also case of *Stevens v. The New York & Oswego Midland R. R. Co.* (1895), 13 Blackford 104, where tax collectors were not enjoined from proceeding to interfere with the property in the hands of receivers by selling it. The author respectfully submits that this case in Blackford's reports antedates and is not in line with Mr. Chief Justice Fuller's statements of the law in 1892 in *In re Tyler*, referred to above.

⁶⁹ *In re Tyler*, Petitioner (1892), 149 U. S. 164, at 183, 37 L. ed. 689.

⁷⁰ *Marsh v. Bird* (1884), 22 Fed. 180.

imposed there may not be a lien upon any specific property in the hands of the receiver.⁷¹ Taxes upon the property in the hands of the receiver assessed after his appointment may properly be regarded as part of the costs and expenses of the receivership and may be ordered paid in full as other costs and expenses.⁷² When a receiver has been in possession of personal property of a judgment debtor during the time when a levy might have been made by the taxing authorities, the court will direct the payment of such taxes out of the proceeds of the sale of such property in preference to all other claims.⁷³

§ 830. Payment of United States Corporation Taxes by Receivers. A distinction must be made between the corporation's primary franchise or right of corporate existence and between franchises owned by the railroad or other corporation.⁷⁴ By the United States Act of August 5, 1909, the tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate business and with respect to the carrying on thereof.⁷⁵

The Act of August 5, 1909, does not impose any duty upon receivers of corporations or of corporate property with respect to paying taxes upon the income arising from their management of the corporate assets or with respect to making any return of such income, because although receivers may hold for the time being all the franchises and property of the corpora-

⁷¹ *Central Trust Co. v. New York Central & N. R. R. Co.* (1888), 110 N. Y. 250, at 257, 18 N. E. 92; *Coy v. Title Guarantee & T. Co.* (1914), 212 Fed. 520, at 523; *Coy v. Title Guarantee & T. Co.* (1914), 220 Fed. 90, at 92; *Greeley v. The Provident Sav. Bk.* (1889), 83 Mo. 458, at 460; *New Jersey, etc., R. R. Co. v. Board of R. R. Com.*, 41 N. J. L. 235; *Spalding v. Commonwealth*, 88 Ky. 135, 10 S. W. 420; *Central Trust Co. v. Wabash R. R.*, 26 Fed. 11; *Ex parte Chamberlain*, 55 Fed. 704; *Walters v. Western Ry.*, 68 Fed. 1002; *Bear River Paper & Bag Co.*

v. City of Petoskey (1917), 241 Fed. 53, at 57.

⁷² *Wiswall v. Kunz* (1898), 173 Ill. 110, 50 N. E. 184.

⁷³ *George v. St. Louis Cable & St. Ry. Co.* (1890), 44 Fed. 117, at 119. See *Ledonce v. La Bee* (1897), 83 Fed. 761; *Walters, et al., v. Western & A. R. Co. (Stewart, Intervenor)*, 68 Fed. 1002.

⁷⁴ *United States v. Whitridge* (1913), 231 U. S. 144, at 149, 58 L. ed. 159, 34 S. C. Rep. 139.

⁷⁵ *Flint v. Stone-Tracy Co.*, 220 U. S. 107, at 145, 55 L. ed. 389, 31 S. C. Rep. 342.

tion excepting its primary franchises of corporate existence, and although they may manage and operate the railroad or the public utility and discharge the public obligation of the corporation in that behalf, nevertheless they do this as officers of the court and subject to the orders of the court, not as officers of the respective corporate organizations as such.⁷⁶

A distinction may properly be made between payment of a corporation tax imposed on an excise or privilege and a tax on property or upon income merely as income.⁷⁷

§ 831. Payment of State Corporation Tax by Receiver. We have a recent New York decision which holds that operation of a ferry company could only have been under the corporate franchises, and if so, then the right of the controller to levy a franchise tax attached during the period of time the corporation properly was run by the receiver.⁷⁸ A recent Kansas case holds that a foreign railway corporation may be required to pay a state tax upon the privilege of doing intrastate business. The author thinks this tax may be properly held assessed upon the privilege of doing business in Kansas yet not upon the primary franchise of being a corporation. In the author's opinion the Kansas court goes very far when it says: "Where a receiver is carrying on the business of a corporation as a going concern, he is in effect exercising its corporate franchise, and the state properly looks to him to pay the taxes imposed upon it," because the Supreme Court of the United States, discussing the United States Corporation Tax Law of August 5, 1909, sec. 38, 36 Stat. 11, 112, said: "A distinction must be made between the corporation primary franchise or right of corporate existence and between franchises owned by the railroad or other corporation." ⁷⁹

⁷⁶ *United States v. Whitridge* (1913), 231 U. S. 144, at 149, 58 L. ed. 159, 34 S. C. Rep. 139; affirming *Penn. Steel Co. v. New York, etc.* (1912), 193 Fed. 286; *Penn. Steel Co. v. New York, etc.* (1912), 198 Fed. 774.

⁷⁷ *United States v. Whitridge*, 231 U. S. 144, at 148, 58 L. ed. 159,

34 S. C. Rep. 139; cited and explained in *Coy v. Guarantee, etc.* (1915), 220 Fed. 95, at 95.

⁷⁸ *The State, ex rel., v. Sessions* (1915), 95 Kan. 272, at 279, 147 Pac. 789.

⁷⁹ *United States v. Whitridge* (1913), 231 U. S. 144, at 149, 58 L. ed. 159, 34 S. C. Rep. 139.

§ 832. Costs. The word "costs" seems to have a technical meaning and is usually applied to the legal charges of a proceeding.⁸⁰ There was no such thing as "costs" of a suit at common law, but if the plaintiff did not prevail he was punished in amercement to the king for false claims. If he did prevail then the defendant was in misericordia for his unjust detention of the plaintiff's right, but this made the plaintiff no amends for the costs that he had laid out of pocket in obtaining his right.⁸¹ The English statutes⁸² as early as 1278 permitted the court to tax the moderate fees of council and attorneys that attend the cause.

The costs and disbursements now frequently allowed by statutes generally include fees payable to counsellors, solicitors and attorneys, and payments made to officers who are entitled to charge fees for official services and to the legal fee of witnesses.⁸³

Costs are generally adjudged the plaintiff or successful party to reimburse him for expenditures made. It is only in exceptional cases in America that the attorneys for the litigants are allowed their fees out of the funds in courts or to be paid by the opposing litigant.

The costs and expenses incident to a receivership are not ordinarily the technical or taxable costs as between a prevailing party on the one side and a losing party on the other.⁸⁴

§ 833. Costs of Realization of Assets. "We are all aware that when incumbered property or property on which there is a lien is sold, then the incumbrancers or persons claiming a

⁸⁰ *Society v. Hughes* (1890), 125 N. Y. 108, 26 N. E. 1; *Stevens v. Central Bk.* (1901), 168 N. Y. 566, 61 N. E. 904; *Brower v. "The Maiden"* (1832), 4 Fed. Cas. No. 1907.

⁸¹ *Viner's Abr. "Costs,"* Vol. 6, p. 321.

⁸² *Statute of Gloucester* (1278), Ed. I, ch. 1.

⁸³ *Society v. Hughes* (1890), 125 N. Y. 108.

⁸⁴ *Eiswald v. Nautical Preparatory School* (1910), 75 Atl. 262, at 263 (R. I.). See contra, *Stacy v. McNicholas* (1915), 148 Pac. 67, 73 Or. 167, wherein compensation of a receiver has been held to be taxable as part of the costs in the case and entitled to priority of payment as a first lien upon the property.

lien can not assert the propriety of the sale and ask for payment out of the proceeds of sale without allowing to be deducted in the first instance the costs which have been incurred in realizing those proceeds. If you come here to claim the benefit of the sale so as to get payment, it follows that you must pay the costs incurred in producing the sum which is available for payment. That is generally understood by costs of realization, and those are the costs which take precedence even of a first mortgagee although the sale may not have been made for him or even in the first instance with his concurrence. Those costs include sometimes such things as the auctioneer's fees, the survey necessary for preparing the conditions of sale and so on according to the nature of the property.⁸⁵

"This is a matter of contract. The incumbrancer, who comes in to claim the proceeds of the sale, is by claiming these proceeds, assenting to the sale. He says the sale is rightly made. He ratifies that which has been done, and therefore, he must pay the costs incurred in that rightful doing of that right action * * * The contract into which he enters is a contract that the sale has been made for his benefit and rightly made and therefore, he must pay the costs of realization."⁸⁶

"If the property is realized in the proceedings to which they are parties, they (the debenture holders) must pay the costs of realization, just as they would have had to pay them if they had their own suit for the purpose of realizing it, or if they had employed a person out of doors. Those are charges to be deducted out of the proceeds of the property, and they are only entitled to the net proceeds of the property."⁸⁷

Expenses of realization are generally payable out of the fund prior to any claim of the mortgagee.⁸⁸ A liquidator is much more in the position of an ordinary receiver, or even of a

⁸⁵ *Lathom v. Greenwich Ferry Co.* (1895), 72 L. T. R. 793.

⁸⁶ *Lathom v. Greenwich Ferry Co.* (1895), 72 L. T. R. 793; *In re Oriental Hotels Co.* (1871), L. R. 12 Eq.

126; *Ross v. South Delaware Gas Co.* (1914), 89 Atl. 593 (Del. unof.).

⁸⁷ *In re Regent's Canal, etc.* (1875), C. A. 3 Ch. D. 427.

⁸⁸ *In re Oriental Hotels Co.* (1871), L. R. 12 Eq. 126.

mortgagor who has executed a bill of sale than of an execution creditor. The costs of liquidation are to be paid out of the fund.⁸⁹ Assets under a receivership are generally realized by the receiver but the plaintiff⁹⁰ or other party to the suit may make the sale or otherwise realize the assets.

The courts have even gone further and held that, "Whoever realizes assets and does so with the sanction of the court and incurs costs, such costs shall be paid first,"⁹¹ and that the costs of realization stand in a different position from other claims. The property must be realized by someone in order that it may be distributed, and whoever has realized it and brought the proceeds under the control of the court has really constituted the fund which has to be distributed for the benefit of the receiver and everyone else who is entitled. The costs in such a case must, therefore, be paid in priority to the receiver.⁹²

Employment of Auctioneer. A stockholder or officer of a corporation may be legally appointed by the court to make a sale of property involved in litigation.⁹³ Such an auctioneer or other auctioneer employed by a receiver under duly authorized order of court is entitled to his compensation⁹⁴ as a part of the cost of realization.

§ 834. Costs of Preservation of Assets. A receiver was ordinarily appointed to preserve property pending litigation. However, another purpose for which a receiver can be appointed is to realize property in foreclosure proceedings, winding-up proceedings, etc. It is also true that frequently a receiver appointed to preserve property in addition to preserving it realizes the property for all entitled to it. The

⁸⁹ *In re Marine Mansion Co.* (1867), L. R. 4 Eq. 601.

⁹⁰ *Batten v. Wedgewood* (1884), 52 L. T. R. 213, 28 Ch. D. 325.

⁹¹ *Ross v. South Delaware Gas Co.* (1914), 89 Atl. 593 (Del. unof.); *Batten v. Wedgewood* (1884), 52 L. T. R. 213; *Pusey & Jones v. Penn-*

sylvania Paper Mills (1909), 173 Fed. 637.

⁹² *Batten v. Wedgewood* (1884), 28 Ch. D. 325.

⁹³ *Dupruy v. Delaware Ins. Co.* (1894), 63 Fed. 680.

⁹⁴ *Friedrichs v. Friedrichs, Young & Taney* (1910), 126 La. Rep. 690, 52 So. 996.

costs of preserving it are such expenditures as insurance premiums, cost of caretaker, etc.⁹⁵

“The services rendered by a receiver or liquidator in continuing a business generally affect the mortgagor. Though continuing the business might ultimately tend to make the property fetch more, it can not create a charge against mortgagees,” was held by the Court of Appeals of England in 1875 in the matter of the liquidation of an iron works company.⁹⁶

The only costs of preservation of the property which might create a charge against a mortgagee are the repairing of the property, paying rates and taxes, which would be necessary to prevent any forfeiture or putting a person in to take care of the property. Keeping the thing going for some years may enable the receiver to ultimately receive more for the debenture holders and maybe not. It is a surmise, and such services rendered by keeping the business going really benefits the mortgagors.⁹⁷

(a) Insuring Property in Receiver's Hands. Preservation of the property includes insurance against fire, and if in reasonable jeopardy from tornado or wind, the receiver would be justified and it would be his duty to insure against such hazard.⁹⁸ Such insurance, to be a charge against the property or fund, must be reasonable.⁹⁹

Without an assignment to the receiver of title, strictly speaking, there is no change of title, and so it has been held that a fire policy providing against a change of ownership has not been voided by the appointment of a receiver; nevertheless, policies should be examined carefully, and if necessary, new policies secured issued direct to the receiver, or else a full

⁹⁵ In re Regent's Canal, etc. (1875), C. A. 3 Ch. D. 427; Raht v. Attrill (1887), 106 N. Y. 435, 13 N. E. 282.

⁹⁶ In re Regent's Canal, etc. (1875), 3 Ch. D. 427 C. A. See In re Oriental Hotel Co. (1871), L. R. 12 Eq. Cas. 126, at 135.

⁹⁷ In re Regent's Canal, etc. (1875), C. A. 3 Ch. 427.

⁹⁸ Graham v. Noakes (1895), 1 Ch. 71.

⁹⁹ Atwood v. Knowlson (1900), 91 Ill. App. 265.

recognition written on the policy of the liability under the receivership.

(b) Repairs on Property in Receiver's Hands. The direction in an order appointing a receiver that he shall manage as well as set and let the estate authorizes him to propose to the master from time to time to make ordinary repairs to the buildings on the estate.¹ Under the old practice it was customary for the master to receive from the receiver proposals for leases and from time to time report his opinion upon them to the court.²

Repairs of the estate fall within the scope of a receiver's duty. He is allowed to do certain repairs without even coming into court. There is no exact rule as to the amount that he may do upon his own responsibility, but, of course, what he does upon his own responsibility is liable to be questioned, unless he obtained the previous sanction.³ A receiver, under the pretense of keeping the property in necessary repair, is not permitted to spend large sums upon it for the benefit of the party holding a certificate of purchase.⁴

(c) Watching Property in Receiver's Hands. Putting a person in to take charge of the property is included among the costs of preservation.⁵ The objects of appointing a receiver are to preserve and at times realize property. Sometimes the property is in danger from the occupier or one in possession and at other times it is in danger from third parties. In either case the receiver must properly protect the property. If a watchman is absolutely necessary it would seem that it is not only with the receiver's power, but it is the receiver's duty, to secure one, even without first obtaining an order of court. In such an event the employment of the watchman should be

¹ *Thornhill v. Thornhill* (1845), 14 Sim. 600; *Duffield v. Elwes* (1849), 11 Beav. 590.

² *Symons v. Symons* (1836), 2 Y. & C. 1.

³ *Graham v. Noakes* (1895), 1 Ch. D. 72. See *In re Pleasant Hill*

Lumber Co. (1910), 126 La. 746, at 761, 52 So. 1010.

⁴ *Standish v. Musgrove* (1906), 223 Ill. 500, at 504, 79 N. E. 101.

⁵ *In re Regent's Canal, etc.* (1875), L. R. 3 Ch. D. 411, at 427; *Raht v. Attrill* (1887), 106 N. Y. 435, 13 N. E. 282.

sanctioned by the court as soon as possible. A receiver who appoints a custodian not reasonably necessary will be charged with the expense.⁶

§ 835. Costs in Actions Brought by Receiver. It is well settled that in a mortgagee's action, where a receiver and manager has been appointed, it is for the court to determine whether proceedings shall be taken at the expense of the mortgaged property. The receiver can not do this of his own initiative, but would run the risk of his costs being disallowed if he did not obtain the direction of the court, and neither mortgagor nor mortgagee has any absolute right to insist upon an action being brought, or to prohibit it being brought by the receiver at the expense of the mortgaged property. In sanctioning the receiver taking proceedings, the court has regard to what it considers right and proper in the interest of the parties.⁷

§ 836. Costs in Actions in Which Receiver Is Appointed. In an action by a debenture holder in behalf of himself and all the other debenture holders of a company to realize his necessity, the usual judgment in a debenture holder action was pronounced, and a receiver and manager appointed. Said Warrington, J.:⁸ "The plaintiff has incurred his costs of the action and the receiver has given his services in the endeavor to realize as large a fund as possible for the benefit of the several persons having charges on it, and I think they are both entitled to be indemnified before the fund is applied in payment of these charges." Litigation, however, may be unnecessary and unwarranted, in which case counsel fees for such litigation are not proper charges against the property in the receiver's hands.⁹

⁶ In re Tisch, 202 Fed. 1018.

⁷ Viola v. Anglo-American, etc. (1912), 11 Ch. D. 305, at 311. See Courland v. Hammer (1846), 9 Beav. 3; Brinklow v. Singleton (1904), 1 Ch. D. 656; Bristow v. Needham (1847), 2 Ph. Ch. R. 190; Nyruse v.

Lord Newborough (1790), 3 Bro. Ch. R. 88.

⁸ Hoffman v. Boynton (1910), 1 Ch. D. 525.

⁹ Burroughs v. Toxaway Co. (1910), 182 Fed. 129, at 138.

§ 837. Costs when Receivership Procured Illegally. Where a receivership is procured illegally, the cost of the receivership may be taxed against the complainant procuring the appointment of such receiver.¹⁰ There may be, however, circumstances existing in cases which would render it a matter of discretion whether or not the court should permit receiver's commissions to be taken out of the funds before they are restored to the true owner.¹¹

It has been held that services rendered by counsel to the receiver in connection with a motion to vacate the order appointing a receiver and dismissing the bill are not proper charges against the estate. A receiver is an officer of the court and whether or not the order appointing him shall be vacated is not a matter to be brought into litigation by him. That question can only be raised by the parties to the bill.¹² When the court reaches the conclusion that neither the particular receiver's services nor those of any other receiver are wanted that is the end of the matter so far as the receiver is concerned.

§ 838. Costs on Appeal. When a receiver appeals a case for the benefit of the creditors, they should bear the expense thereof. The receiver is under no obligation to undertake actions for the benefit of the receivership estate at his own cost.¹³ When an appeal is taken by the receiver at the request of fifty per cent. of the general creditors and for the benefit of the general creditors, costs on appeal are to be paid out of the funds available to the claims of all the general creditors.¹⁴

¹⁰ *Hawes v. First Nat. Bk.* (1915), 229 Fed. 51, at 59; *Philip v. Hudson Film Co.* (1913), 143 N. Y. S. 759, and cases cited at 761; *State v. People's U. S. Bk.* (1906), 179 Mo. 605, at 614, 78 S. W. 780; *The Link Belt Mach. Co. v. Hughes* (1902), 195 Ill. 413, 63 N. E. 186, 59 L. R. A. 673; *McAnrow v. Martin* (1900), 183 Ill. 467, 56 N. E. 168; *Highley v. Deane* (1897), 108 Ill. 266.

¹¹ *P. N. Bank v. Bayne* (1893), 140 N. Y. 321, at 330; *Weston v. Watts* (1887), 45 Hun 219, at 224.

¹² *Burroughs v. Toxaway* (1911), 185 Fed. 435, at 441.

¹³ *State v. Miller* (1912), 135 N. W. 196; *Telford v. Henrikson* (1913), 122 Minn. 531, 142 N. W. 200.

¹⁴ *Knabe v. Johnson* (1908), 69 Atl. 420, 107 Md. 616.

§ 839. Administration Expense—Chargeable against Income.

“The general rule is that the expenses incurred in the administration of the receivership are chargeable only on the income. In some instances, however, the corpus itself may be so charged. But such exceptions are never to be extended beyond their necessity.”¹⁵

§ 840. Receiver's Counsel Fees—Generally. “Fees for receivers and their attorneys are as properly a part of the costs as any other sum necessary to be expended under the order of the court in taking the property and carrying on the business.”¹⁶ In a proceeding in equity to enforce stockholders' liability and bring into court a fund for distribution among creditors, the action being for the equal benefit of all creditors, where all are to share in the fund received from the stockholders, pro rata, it is proper for the court to allow counsel's fees for the counsel bringing this action, the same to be included in the costs. This is allowed on the theory that the labor of the plaintiff's counsel is for the equal benefit of all the creditors. The court in the exercise of its power over the fund and in the discretion of doing full and exact justice to all the parties, has ample power to order paid from the fund reasonable counsel's fees, the same as power to order payment of costs.¹⁷

(a) Allowance of Counsel's Fees. Courts of equity have power to fix allowances for counsel's fees.¹⁸ An allowance of counsel's fees is not made to the attorney direct, for the court does not employ the attorney, neither does the fund or property. But the allowance is made to the receiver as a proper expenditure made by him.¹⁹ Legal services to the receiver create no liability against the individual corporation in the

¹⁵ Finance Co. of Pennsylvania v. Trenton & N. B. Ry. Co. (1911), 189 Fed. 282, at 284.

¹⁶ Insurance & T. Co. v. Coal Co. (1895), 95 Iowa 551, at 558, 64 N. W. 606.

¹⁷ Mason v. Alexander (1886), 44

O. S. 318, at 337, 7 N. E. 435; Hessler v. The Cleve Punch Co. (1899), 61 O. S. 621, at 627, 56 N. E. 469.

¹⁸ Stuart v. Bouleware (1889), 133 U. S. 78, at 82, 33 L. ed. 568.

¹⁹ Joost v. Bennett (1899), 123 Cal. 424, at 427, 56 Pac. 43.

hands of a receiver, although the payment thereof may be paid out of the assets.²⁰

(b) Counsel's Fees Allowed for Resisting Receivership. Said the Supreme Court of Illinois: "Representatives of corporations whose very existence is attacked should be afforded reasonable means for resisting such attack, if the facts appear to justify resistance." "Public policy requires that they should be protected to this extent, but no farther, and a premium should not be held out for captious and vexatious contests at the expense of the funds which the court is under the highest obligation to preserve, as far as possible, to meet the just debts and liabilities of the corporation." *Barnes v. Newcomb*, 89 N. Y. 108.²¹ Attorneys for a building association who resisted a receivership prayed for the association were allowed fees.²²

(c) Counsel's Fees Allowed for Filing Crossbill to Foreclose. Attorneys who intervened in a receivership case on behalf of mortgage creditors and who filed a crossbill which asked for and led to a foreclosure were held to be entitled to counsel's fees out of the estate.²³

(d) Counsel's Fee to Defend Receiver. Said Sanborn, C. J.:²⁴ "The cases in which allowances may be lawfully made out of the trust funds for the services of counsel for a receiver are not limited to those in which those services have effected a recovery of a fund or the protection or preservation of the trust estate. They include cases in which legal services are rendered to defend receivers against actions for torts as well as upon contracts, against actions in which they are defeated as they often are in suits on account of personal injuries caused by their negligence in the operation of railroads, and as they sometimes are in action for breach of contracts, as well as against actions in which they are successful. They include

²⁰ *Farwell v. Great West Tel. Co.* (1896), 161 Ill. 522, at 613, 44 N. E. 891.

²¹ *Assets R. Co. v. Defries* (1907), 225 Ill. 508, 80 N. E. 263.

²² *Assets R. Co. v. Defries* (1907), 225 Ill. 508, 80 N. E. 263.

²³ *Haehnlen v. Drayton* (1911), 192 Fed. 300, at 306.

²⁴ *United States Circuit Court of Appeals, Eighth Circuit* (1915).

and they ought to include all cases arising out of acts done or omitted by receivers honestly and in good faith in the exercise of the authority derived from their appointment and in an honest endeavor to discharge their duties as officers of the courts. * * * A receiver, an officer of the court, is human and liable to err, and if he makes an honest mistake, or in good faith commits an error, that fact ought not to and does not deprive him of the right to the services of counsel at the expense of the trust estate to protect him personally, as well as an officer, against excessive liability. He is entitled to the services of counsel at the expense of the estate to defend him personally against the unduly injurious effect of all his honest acts or omissions in the exercise of the powers of his office.”²⁵

(e) Counsel's Fees—Contributed to by Parties. Said Rose, J.:²⁶ “If one or more persons, be they bondholders, unsecured creditors, stockholders, or what not, institute a proceeding for the benefit of themselves and all others in like class with them who will come into the case and contribute to the expense in bringing into court a fund to be distributed among all persons of the class, a court of equity will require that every member of the class who seeks to participate in the benefits derived from the exertions of counsel shall contribute pro rata to the reasonable compensation of counsel for what they have done in the matter. Such orders by a court of equity are in no way in conflict with the ordinary rule that every litigant must pay his own counsel fee. They are simply enforcing and applying that rule equitably, so as to compel all people who benefit by the litigation to contribute to the cost of it.”²⁷ He who recovers the fund is entitled to the payment of the fees of his counsel out of the fund before distribution.²⁸

²⁵ Missouri & K. I. Ry. v. Edson (1915), 224 Fed. 79, at 82, citing Cowdry v. Railroad Co., 6 Fed. Cas. Nos. 660, 663, 664; Biddle's Appeal, 83 Pa. 340, at 346; Thorne v. Allen (Ky.), 70 S. W. 410, at 412 (Ky. Ct. of Appeals); Lycan v. Müller, 56 Mo. App. 79, at 85.

²⁶ United States Judge of Circuit Court of Appeals, Fourth Circuit (1911).

²⁷ Burroughs v. Toxaway Co. (1911), 185 Fed. 435, at 441.

²⁸ Missouri & K. Ry. Co. v. Edson (1915), 224 Fed. 79, at 82.

(f) **Counsel's Fees to Claimant's Counsel.** LaCombe, J.,²⁹ said: "Where a complicated controversy involving many different interests in a fund is before the court and some particular interest is not so represented that the facts supporting its claim are likely to be fully brought out and properly presented, we know no reason why the court may not assign some competent person to do such work and compensate him as receivers' counsels are compensated, viz, out of the funds in the hands of receivers. We think it would be unfortunate if the courts did not possess such power because the receivers necessarily represent so many different interests that they must generally stand neutral, and there will be many occasions where correct conclusions can be reached only after all sides of the controversy have been vigorously represented."³⁰

A court of equity has jurisdiction over the allowance of costs and proper expenses by the party creating or saving the fund in question, if his acts resulted in benefit to all.³¹ Such expenses include a counsel fee for bringing and conducting litigation by a claimant's counsel, who brings an action which saves to the creditors a greater portion of the estate than would have been realized if no such action had been taken.³²

On the other hand, when a fund has not been created, increased or preserved by the aid of counsel, but has at all times been under the control and protection of the court awaiting a settlement of the rights of the respective contesting claimants thereto, it is not proper for the court to decree fees to counsel for creditors who have conducted a protracted litigation over a part of the fund to be paid out of a residuum of the fund to which such creditors were not and never were entitled,³³

²⁹ Circuit Court of Appeals, Second District (1911).

³⁰ Robinson v. Mutual Reserve Life Ins. Co., and Scoville v. Mutual Reserve Life Ins. Co. (1911), 189 Fed. 347, at 349; cited in Pennsylvania Steel Co. v. New York City Ry. Co. (1915), 221 Fed. 440, at 446.

³¹ Harrison v. Perea, 42 L. ed. 478, 18 S. C. Rep. 129, 168 U. S. 311;

Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157.

³² Ely v. Van Kannel Revolving Door Co. (1911), 184 Fed. 459, at 460. Where counsel bringing action not allowed fee, see Kimball v. Atlantic States Life Ins. Co. (1915), 223 Fed. 463.

³³ Roller v. Paul, et al. (1906), 106 Va. 214, 55 S. E. 558.

or fees to receiver's attorney who rendered no service to bring the fund into court or to protect the fund.³⁴

Said the Chancery Court of Delaware: "Where a creditor of an insolvent company brings an action for the appointment of a receiver and to wind up its affairs, compensation will be allowed to his attorneys for services rendered in bringing the suit for the appointment of a receiver, the same to be paid from the fund in the hands of the receiver, provided such services prove beneficial to other creditors."³⁵

(g) Contribution to Counsel's Fees by Lienholder. "Where the general receiver has assets other than the mortgaged property sufficient to properly compensate him and his counsel, there should be an apportionment of such between the general creditors and incumbrancers, each class paying for the services of which it has derived the benefit."³⁶

See a further discussion by Chancellor Charles M. Curtis, of Delaware, in the case cited below in note 36.

(h) Counsel's Fees Usually Allowed at Close of Case by Court. The usual practice is for the court which appointed the receiver to fix the fees for the receiver's counsel at the close of the receivership.³⁷

(i) Amount of Counsel's Fees. The compensation of counsel is a matter to be determined by the court appointing the receiver who employs counsel.³⁸ The most important question is their reasonableness, which must be determined according to the circumstances of the particular case, the degree of responsibility and business required in the management of the affairs, the perplexity and difficulties involved. Of course the amount of assets involved must also form a determining factor. For the counsel's fees, except in exceptional cases,

³⁴ *Bullock v. Clarke* (1913), 53 Ind. App. 112, 101 N. E. 311.

³⁵ *Ross v. South Delaware Gas Co.* (1914), 89 Atl. 593 (Del. unof.). See 54 L. R. A. 823.

³⁶ *Central T. & S. D. Co. v. Chester Co. etc.* (1911), 9 Del. Ch. 247, 80 Atl. 801, citing *Lembec v. Jarvis*, 68 N. J. Eq. 352, 59 Atl. 565, at

566; *Frick v. Fritz*, 124 Iowa 529, 100 N. W. 513.

³⁷ *Bibber-White v. White River Val. Elect. Co.* (1909), 175 Fed. 470, at 472.

³⁸ *Assets Realization Co. v. De-frees* (1907), 225 Ill. 508, at 513, 80 N. E. 263.

comes out of the funds. A case involving small funds may require just as much work as a case involving large funds, but the counsel's fees will ordinarily be determined with consideration for the amounts involved.³⁹

(j) Notice of Application for Fees by Receiver's Counsel. Said Thayer, C. J., speaking for the United States Circuit Court of Appeals for the Eighth Circuit: ⁴⁰ "There is no usual method of procedure, so far as we have observed, with reference to making allowance in favor of attorneys who have been employed by the receiver with the sanction of the court. In the absence of any well-settled rule of practice or general order governing the subject, we entertain no doubt that application for such orders ought to be accompanied with notice to all parties in interest, or to their solicitors of record, and that such applications ought not to be heard *ex parte*, unless the parties when notified of the application fail to appear. It is a well known fact that large claims are often preferred against funds in the custody of receivers on account of legal services rendered in their behalf. The allowance of such claims depletes the trust fund, and frequently lessens the amount which the parties to the suit would otherwise be entitled to receive and would receive. The parties to the suit, therefore, have an interest in the amount of such allowances and according to well-established principles, they should have notice of applications for such allowances and should be given an opportunity to defend. Any other practice might, and probably would lead to great abuses."⁴¹

§ 841. Debts Having Priority by Statute. Many states have special statutes somewhat similar to the following: "In all cases when property of an employer is placed in the hands of an assignor, receiver, or trustee is appointed, shall first be paid out of the trust fund, in preference to all other claims

³⁹ *Ely v. Van Kannel Revolving Door Co.* (1911), 184 Fed. 459.

⁴⁰ *Merchants Bank v. Cryslor* (1895), 67 Fed. 388, at 391.

⁴¹ *Merchants Bank v. Cryslor* (1895), 67 Fed. 388, at 391. See *In re Wagner* (1915), 155 N. W. 317, 173 Iowa 299, and cases cited.

against such employer, except claims for taxes and the costs of administering the trust." ⁴²

There has been a good deal of litigation, in Ohio, of the question whether labor claims, as provided for in the above statute, shall be paid before the legal claims of the mortgagees. This question was finally settled by the supreme court in *The St. Mary's Machine Co. v. The National Supply Co.*, June 16, 1903, the court saying:

"Where a receiver is appointed and takes possession of chattels covered by a chattel mortgage after condition broken, as provided in General Code of Ohio, sec. 8839, Revised Statutes, sec. 3206a, such chattels, to the extent that the same may be required to satisfy the mortgage, are the property of the mortgagee and not the mortgagor." ⁴³

Ohio General Code, sec. 11138, Revised Statutes, sec. 6355, is in part materia with said Revised Statutes, sec. 3206a, General Code, sec. 8338, and both sections must be read and construed together. ⁴⁴ "Said sec. 6355 applies only to assignees and trustees, while the other section, General Code, sec. 8338, applies to assignees, trustees and receivers; but when the section is properly construed as to assignees and trustees, the same construction must be applied to receivers, because in said sec. 3206a all three stand upon exactly the same footing." Nevertheless it must be noted that General Code, sec. 8338, covering receivers and trustees, provides for wages for three months, and under no construction could we extend this three months to a year, as provided for in the General Code. These two sections were ably discussed and construed in *In re City Trust Co., et al.*, by Lurton, Day and Severens, J., sitting in the U. S. Circuit Court of Appeals, Sixth Circuit, March 18, 1903. ⁴⁵

The English Company's Consolidation Act of 1908 contains very extensive provisions for preferential payments "in a winding up." ⁴⁶

⁴² Ohio Gen. Code of 1910, sec. 8839, R. S., sec. 3206a. (1903), 68 O. S. 535, at 540, 67 N. E. 1055.

⁴³ *Machine Co. v. Supply Co.* (1903), 68 O. S. 535, 67 N. E. 1055. ⁴⁵ *In re City Trust Co.* (1903), 121 Fed. 706.

⁴⁴ *Machine Co. v. Supply Co.* ⁴⁶ *Company's Consolidation Act* (1908), 8 Edw. 7, ch. 69-209.

§ 842. Priority of Six Months' Claims in Railroad Cases.

Said the U. S. Circuit Court of Appeals, Ninth Circuit, in 1914, Dietrich, C. J., speaking for the court: "That six months' claims are to be given a preference has been decided a great number of times by the highest courts of the land. Questions have previously arisen, however, as to what shall be included in those claims, and further, are claims for current supplies and services which accrued during the period of six months immediately preceding the appointment of the receiver on account of labor done and materials furnished in the ordinary course of business for the normal maintenance and operation of the railroad to be paid out of the current income of the road while in the hands of a receiver in preference to the bonds or other mortgage indebtedness of the road, upon the assumption that the lien of the mortgage attaches only to the residue of the income remaining after the payment of the operating expenses, or may they displace the vested lien of the mortgage upon the corpus of the estate, because the claimants by their labor and supplies rendered necessary assistance in continuing the operation of the property, thus enabling the debtor to discharge its obligations to the public? The question has been the subject of frequent consideration in the federal courts, and the decisions are in hopeless conflict. Different rules have prevailed in the several circuits and in some instances there have been an apparent lack of unanimity in the same circuit."⁴⁷

Said the United States Circuit Court of Appeals for the Eighth Circuit, in 1915, Carland, C. J., speaking for the court as follows: "The class of claims which, under the decisions of the supreme court, may lawfully receive an equitable preference in payment out of the income or out of the corpus of the property of a mortgaged railroad over the bondholders secured by a prior mortgage; is limited to claims incurred for the current expenses of the ordinary operation of the mortgaged property. The test of the preferential equity of a claim is its

⁴⁷ *Moore v. Donohor* (1914), 217 Fed. 177, at 180, citing *Greg v. Trust Co.*, 197 U. S. 183, 49 L. ed. 717. See *St. Louis T. Co. v. Riley* (1895), 70 Fed. 32, 16 C. C. A. 614; *Rodger, etc., v. Omaha, etc.* (1907), 154 Fed.

632. See *Texas Co. v. International & G. N. Ry. Co.* (1916), 237 Fed. 921. See also cases reviewed in *Crane Co. v. Fidelity Trust Co.* (1917), 238 Fed. 693, at 702.

consideration. If its consideration was a current expense of the ordinary operation of the property of the mortgagor incurred in the usual course of its business, for labor, supplies and like things, necessary for the operation of the railroad, within a limited time, usually not exceeding six months anterior to the appointment of the receiver, the claim may be preferred in payment; otherwise, it may not be."⁴⁸

"Railroad mortgages and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests."⁴⁹ "The new and changed condition of things which is presented by the insolvency of such a corporation as a railroad company has rendered necessary the exercise of large and modified forms of control of its property by the courts charged with the settlement of its affairs and the disposition of the assets."⁵⁰ "It is well settled that a railroad mortgagor impliedly agrees that the current debts incurred in the ordinary course of the mortgagor's business shall be paid from current income before his claim attaches."⁵¹

The doctrine of equitable preference given to unsecured debts contracted before the appointment of a receiver, over the lien of a mortgage holder, when distributing the fund arising from the sale of the mortgaged property, has been frequently recognized. This doctrine has been recognized by decisions of the circuit courts of the United States and also by decisions of the Supreme Court of the United States. A careful inspection of these decisions will show that they have not extended the doctrine beyond railroads or railways and traction roads, or other public service corporations, they being so-called quasi-public corporations performing services for the general public.⁵²

⁴⁸ *Love v. North American Co.* (1915), 229 Fed. 103, at 107, and cases cited; *United States & Mexican Trust Co. v. Beaty* (1917), 240 Fed. 592. See *Rodger, etc., v. Omaha, etc.* (1907), 154 Fed. 632; *Southern Ry. v. Carnegie Steel Co.* (1899), 176 U. S. 283, 44 L. ed. 458; *Shugart, etc., v. Atlantic, etc.* (1913), 143 N. W. 90, 161 Iowa 351.

⁴⁹ *Fosdick v. Schall* (1878), 99 U. S. 252, 25 L. ed. 339.

⁵⁰ *Barton v. Barbour* (1881), 104 U. S. 134, 26 L. ed. 672; *Central T. Co. v. Thurman* (1894), 94 Ga. 725, at 741, 20 S. E. 141.

⁵¹ *Missouri Ry. v. City Trust Co.* (1913), 209 Fed. 45.

⁵² *Central Trust Co. v. Thurman* (1894), 94 Ga. 725, at 741, 20 S. E. 141. See *Missouri Ry. & City Trust Co.* (1913), 209 Fed. 45. See *Crane Co. v. Fidelity Trust Co.* (1917), 238 Fed. 693, at 702.

It has been held that under special circumstances the court may direct the payment of ante-receivership debts for labor and supplies contracted within a limited period before the insolvency or receivership, the adjustment and payment of traffic balances in favor of connecting roads, and may direct the receiver to operate the road pending foreclosure and to that end purchase necessary rolling stock for the use of the road and make repairs and improvements thereon, the expense of which shall be a charge on the property in priority to legal liens.⁵³

As early as 1859, a state court allowed a charge for services, money or material to be paid before the mortgage debt, saying: "If a laborer; officer or agent has devoted his time to manage a road and swell its income, or if a creditor has, for the same purpose, supplied cordwood or added to the value of the road by materials furnished, no court of equity can say, in the light of justice, that all this should pass unpaid for to mortgagees, nor is there any analogy between this and ordinary mortgages in this respect. The use of the road indispensably requires all these things, while it is not so with credits given to individual mortgagors. The public necessity for passenger and freight transportation, the legal duty of a railway company to operate its road, with the penalty of forfeiture for nonuser, and liability for damages for refusal to discharge the duties of a common carrier, the duty to create income to meet mortgage liabilities, the benefits to accrue to bondholders, all require, as a matter of public policy, that the law should protect and pay those who aid in operating our railroads. Without this, every bond will become valueless, every road will cease operating."⁵⁴ It must be noted

⁵³ *Raht v. Attrim* (1887), 106 N. Y. 423, at 435, 13 N. E. 282, citing *Wallace v. Loomis* (1877), 97 U. S. 146, 28 S. E. 596, 4 S. C. Rep. 675; *Fosdick v. Schall* (1878), 99 U. S. 235, 25 S. E. 339; *Barton v. Barbour* (1881), 104 U. S. 126, 26 S. E. 672; *Miltenberger v. Logansport* (1882), 106 U. S. 286, 27 S. E. 117, 1 S. C. Rep. 140; *Union T. Co. v. Souther* (1882), 107 U. S. 591, 27

S. E. 488, 2 S. C. Rep. 295; *Burnham v. Bowen* (1883), 111 U. S. 776, 28 S. E. 596, 4 S. C. Rep. 675; *Union T. Co. v. Illinois Mid. Ry.* (1885), 117 U. S. 434, 29 S. E. 963, 6 S. C. Rep. 809; *Chicago & A. R. Co. v. United States, etc.* (1915), 225 Fed. 940, at 943.

⁵⁴ *Darst v. Railway Co.* (1859), 3 Ohio Dec. Rep. 199.

that the above charge was allowed against income and not allowed against the corpus of the property.

The latest United States Supreme Court case is *Gregg v. Metropolitan Trust Co.*,⁵⁵ which went up from the Sixth Circuit. The petitioner made a claim on the body of the fund for ties furnished within six months before the appointment of a receiver and the claim was held not good against the corpus. The court goes into the question of equitable lien and priorities very carefully and three judges dissent.

Holmes, J., says: "Cases like *Union Trust Co. v. Southern*, 107 U. S. 591, where the order appointing the receiver authorized him to pay debts for labor or supplies furnished within six months out of income, stand on the special theory which has been developed with regard to income and afford no authority for a charge on the body of the fund. *Fosdick v. Schall*, 99 U. S. 235; *Burnam v. Bowen*, 111 U. S. 776; *Morgan's L. & T. R. R. & S. Co. v. Texas Central Ry.*, 137 U. S. 171; *Virginia & Alabama Coal Co. v. Central R. R. & Bk. Co.*, 170 U. S. 355; *Southern Ry. Co. v. Carnegie Steel Co.*, 176 U. S. 357. It is agreed that the petitioner may have a claim against surplus earnings, if any, in the hands of the receiver, but that question is not before us."⁵⁶

The pioneer case in the United States Supreme Court is *Fosdick v. Schall*,⁵⁷ holding that the receiver may pay, out of current income, certain outstanding debts for labor, supplies, equipment or permanent equipment.

(a) Claims for Torts Do Not Come under Six Months' Rule. Claims for torts committed during the operation of the road prior to receivership are not to be given a preference over the claims of secured creditors.⁵⁸

⁵⁵ *Gregg v. Metropolitan Trust Co.* (1904), 197 U. S. 183, 49 L. ed. 717.

⁵⁶ *Gregg v. Metropolitan Trust Co.* (1904), 197 U. S. 183, at 188 49 L. ed. 717.

⁵⁷ *Fosdick v. Schall* (1878), 99 U. S. 235, at 251, 25 L. ed. 458.

⁵⁸ *Guarantee Trust Co. of N. Y. v.*

Metropolitan Ry. Co. (1910), 180 Fed. 637; *Pennsylvania Steel Co. v. New York City Ry. Co.* (1908), 165 Fed. 457; *St. Louis Trust Co. v. Riley*, 70 Fed. 32; *Veatch v. American Loan & Trust Co.*, 79 Fed. 471; *Veatch v. American Loan & Trust Co.*, 84 Fed. 274; *Atlantic Trust Co. v. Dana*, 128 Fed. 209; *Atchi-*

Said Sanborn, C. J., in 1895, speaking for the United States Circuit Court of Appeals, Eighth District: "A claim for damages for the negligence of the mortgagor lacks the indispensable element of a preferential claim. It is not based upon any consideration that inures to the benefit of the mortgage security. Wages, traffic balances and supplies produce or increase income and preserve the mortgaged property. Repairs and improvements increase the value of the security of the bondholders. But the negligence of the mortgagor neither produces an income nor enhances the value of the property. The wages, traffic balances and claims for material and supplies accrue under and pursuant to the contract between the mortgagor and mortgagee that the former will properly operate the railroad. The damages for negligence accrue in violation of that contract and for a breach of the duty of the mortgagor to operate the railroad carefully.

"Many preferential claims are for property or services that were necessary to make or keep the railroad a going concern, necessary to its operation. The negligence that is the foundation of this claim did not tend to keep the railroad in operation, but if repeated and continued, would inevitably stop it. It was not necessary but was deleterious to its operation. For these reasons this claim for damages can not, in our opinion, be allowed a preference over the mortgage debt in payment out of the income earned by the receivers appointed under bills for the foreclosure of these mortgages." ⁵⁹

(b) Claims for Counsel Services May Come under Six Months' Rule. A claim for services rendered by a firm of lawyers for a railway more than six months prior to a receivership of that railway is not of the character entitling it to any priority in the matter of payment over the claims of bondholders.⁶⁰ Yet services of regularly employed attorneys ren-

son, T. & S. F. v. Osborn, 148 Fed. 608; Central Trust Co. v. Warren, 121 Fed. 323; Farmers L. & T. Co. v. Northern P. Ry., 79 Fed. 227; Pennsylvania Steel Co. v. New York City, etc. (1914), 116 Fed. 458, at 472.

⁵⁹ St. Louis Trust Co. v. Riley (1895), 70 Fed. 32, 16 C. C. A. 610, at 615.

⁶⁰ Chadbourne v. Equitable Trust Co. of New York (1915), 225 Fed. 981, at 982.

dered within six months were held to come within the six months' rule of preference and such attorneys were employees, although paid by fees on accounts rendered and audited at statutory periods instead of by salary.⁶¹

(c) Six Months' Rule Not Inflexible as to Time. Generally claims originating more than six months prior to the receivership are not included in the so-called six months' rule covering equitable preferences over lienholders, but there is no absolutely fixed rule as to the time limit.⁶²

Said Mr. Justice Harlan⁶³ on the subject: "Each case as already observed must depend largely upon its special facts. In some cases the courts, in the administration of railroad property by receivers, have refused to give priority to unsecured claims that did not accrue within six months immediately preceding the appointment of receivers. Such a rule will do full justice in most cases to creditors who are entitled to look to current receipts for the payment of current debts. but no absolute rule on the subject has been prescribed by statute or by judicial decisions. A claim accruing back of the six months immediately preceding the appointment of a receiver may, under the circumstances of particular cases, be accorded the same priority in the distribution of earnings that belongs to like claims arising within that period."⁶⁴

In a case wherein it was not contemplated that the supplies were to be paid for when furnished more than six months prior to the receivership, but it was agreed that payment be postponed until the plant should be so repaired as to enable its continued operation, the supply claim was preferred to mortgage creditor.⁶⁵

⁶¹ *Seaboard Air Line v. Continental Trust Co.* (1908), 166 Fed. 597.

⁶² *Citizens Trust Co. v. National Equipment & Supply Co.* (1912), 98 N. E. 865, at 867, 178 Ind. 167.

⁶³ *Southern Railway v. Carnegie Steel Co.* (1899), 176 U. S. 257, at 292, 44 L. ed. 458.

⁶⁴ *Southern Railway v. Carnegie*

Steel Co. (1899), 176 U. S. 257, at 292, 44 L. ed. 458.

⁶⁵ *Citizens Trust Co. v. National Equipment & Supply Co.* (1912), 98 N. E. 865, at 868, 178 Ind. 167, citing *McIlhenny v. Binz*, 80 Tex. 1, 13 S. W. 655; *Hale v. Frost*, 99 U. S. 389, 25 L. E. 419; *Burman v. Bowen*, 111 U. S. 777, 28 L. E. 596, 4 S. C. Rep. 675; *Atkins v. Petersburg*

(d) Six Months' Rule Held Applicable to Excessive Freight Rates by Receiver. When shippers of freight paid excessive freight rates to a railroad under certain orders of a state corporation commissioner, and the railroad, in appealing from the decision, entered into a bond to refund the excess of certain payments made by the shippers, and the railroad went into a receiver's hands, it was held that any excess coming to the shipper on appeal was a claim of the shipper incurred "for the current expenses of the ordinary operation of the railroad, in the usual course of business of the road," and a preferential claim under the so-called six months' order.⁶⁶

(e) Test for a Claim under Six Months' Rule. Said Carland, C. J., in 1915, speaking for the United States Circuit Court of Appeals for the Eighth Circuit, as follows: "The test of the preferential equity of a claim is its consideration. If its consideration was a current expense in the usual course of its business for labor, supplies and like things necessary for the operation of the railroad, within a limited time, usually not exceeding six months anterior to the appointment of the receiver, the claim may be preferred in payment, otherwise it may not be."⁶⁷

It is entirely within the discretion of the court appointing the receiver to determine which, if any, claims incurred within six months prior to the receivership shall be paid by the receivers, and it is those which are not only necessary but whose payment is necessary to keep the road a going concern

Ry., 3 Hughes 307; *Miltenberger v. Logansport*, 106 U. S. 286, 27 L. E. 117, 1 S. C. Rep. 140; *Turner v. Indianapolis, etc., Ry.*, 8 Biss. 315.

⁶⁶ *Love v. North American* (1915), 229 Fed. 103, at 107. See *United States & Mexico Trust Co. v. Kansas City M. & O. Ry.* (1917), 240 Fed. 505.

⁶⁷ *Love v. North Amer. Co.* (1915), 229 Fed. 103, at 107, citing *Illinois T. Co. v. Doud*, 105 Fed. 123, at 124, 129, 52 L. R. A. 481; *Rodger Ballast Car Co. v. Omaha Ry.*, 154 Fed. 629, at 632; *Blair v.*

Railroad Co., 23 Fed. 523; *Whiteley v. Central T. Co.*, 76 Fed. 74, at 75, 77, 34 L. R. A. 303; *Gay v. Hudson R. E. P. Co.*, 182 Fed. 904, at 907, 909; *Pennsylvania Steel Co. v. New York City, etc.*, 165 Fed. 485; *Farmers L. & T. Co. v. Northern Pac. Ry.*, 68 Fed. 36, at 41, 42; *Fordyce v. Omaha City Ry.*, 145 Fed. 544, at 556, 557; *Chicago Ry. v. United States & M. T. Co.*, 225 Fed. 940; *Martin Metal Mfg. Co. v. United States & M. T. Co.*, 225 Fed. 961.

which should be paid out of the corpus of the property.⁶⁸ Claims for wages, station rentals, and balances due connecting lines are allowed. Claims for coal are not allowed.⁶⁹

§ 843. Priority of Six Months' Claims Ordinarily Not Allowed against Corpus of Property. The latest United States Supreme Court case flatly allows claims for labor and supplies furnished within six months to be paid out of income by the receiver, but the question of paying out of the corpus of the property for certain ties purchased within six months before appointment of receiver and on hand and used by the receiver was decided in the negative by a divided court.

Holmes, J.,⁷⁰ wrote the opinion, and says the general rule on this subject is against allowing claims for supplies to take precedence over a lien expressly created by a mortgage recorded before the contracts for supplies were made, and quotes *Kneeland v. American L. & T. Co.*, 136 U. S. 89, at 97, as laying down that general rule protecting a mortgagee's interest in the property. He also distinguishes the cases which allow an equity for six months' claims, not against the income earned by the receiver, but against the corpus of the property, and refuses to lay down a general rule permitting such a charge, saying: "In *Millenberger v. Logansport Ry. Co.*, 106 U. S. 286, the charge made was one for the business of the road."

"In *Union Trust Co. v. Illinois Midland Ry.*, 117 U. S. 434, at 465, labor claims accruing within six months before the appointment of the receiver were allowed without special discussion."

In *St. Louis, Alton, etc., Ry. v. Cleveland, etc., Ry.*, 125 U. S. 658, at 673, 674, there were two roads involved. In both those cases there was a diversion of earnings. But the pay-

⁶⁸ *Taylor v. Delaware, etc., Ry.* (1914), 213 Fed. 622, at 624, citing *Gregg v. Metropolitan*, 197 U. S. 186, 40 L. E. 717.

⁶⁹ *Taylor v. Delaware, etc., Ry.* (1914), 213 Fed. 622, at 624.

⁷⁰ *Gregg v. Metropolitan Trust Co.* (1904), 197 U. S. 187, 49 L. ed. 717;

cited and followed in *Carbon Fuel Co. v. Chicago R. Co.* (1912), 202 Fed. 172, at 174. See *Love v. North American Co.* (1915), 229 Fed. 103, at 107; *Chicago, etc., Ry. v. United States & M. T. Co.* (1915), 225 Fed. 940, at 943.

ment of the employees of the road is more certain to be necessary in order to keep it running than the payment of any other class of previously incurred debts.

The rule laid down by Breuer, J., in *Kneeland v. American Loan Co.*, 136 U. S. 89, at 97, seems to be a most salutary and safe one and the same is approved by the majority of the court in *Gregg v. Metropolitan Trust Co.*, 197 U. S. 183. If exceptional cases arise exactly like those in *Miltenberger v. Logansport Ry. Co.*, 106 U. S. 286, or *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434, or *St. Louis, Alton, etc., Ry. v. Cleveland, etc., Ry.*, 125 U. S. 658, or if cases arise which are substantially like those, the courts might make such charges a lien prior to the mortgagee's lien, but we think the cases are very exceptional.

Said the United States Circuit Court of Appeals, Ninth Circuit, in 1914, after referring to the conflict of authority on the theory of six months' claims: "The real basis upon which the preference rests is thought to be implied understanding on the part of all parties that such debts are to be paid out of the current income before the mortgagee has any claim thereto. * * * " ⁷¹ "Yet it is also said that sometimes the court can require restoration of the diverted income from the corpus of the fund, the power so to do resting upon the fact that in the administration of the affairs of the company, the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors." ⁷²

If there has been no diversion of income there can not be any restoration from the corpus or proceeds of the property itself, and the amount of the restoration can not exceed the amount of diversion. ⁷³

⁷¹ *Moore v. Donahoe* (1915), 217 Fed. 177, at 184; *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 458; *Southern Ry. v. Carnegie Steel Co.*, 176 U. S. 257, at 285, 44 L. ed. 458; *Burnham v. Bowen*, 111 U. S. 776, at 780, 783, 28 L. ed. 596; *Chicago, etc., v. United States M. & T. Co.* (1915), 225 Fed. 940, at 943. See where claim was allowed out of corpus in *United States & Mexican Trust Co. v. Beatty* (1917), 240 Fed. 592.

⁷² *Moore v. Donahoe* (1914), 217 Fed. 177, at 184; *Burnham v. Bowen*, 111 U. S. 776, at 780, 783, 28 L. ed. 596; *St. Louis, Alton, etc., Ry. v. Cleveland, etc., Ry.*, 125 U. S. 658, at 673, 31 L. E. 832, 8 S. C. Rep. 1011.

⁷³ *Chicago, etc., Ry. v. United States M. & T. Co.* (1915), 225 Fed. 940, at 943; *Pennsylvania Steel Co. v. New York, etc.* (1914), 216 Fed. 458, at 471.

§ 844. Priority of Six Months' Claims in Cases Other than Railroads. In cases other than railroads or public service corporations, where the public is not involved, there seems no excuse why claims for supplies furnished previous to the receivership should be either a prior claim against the earnings of the receiver as such or against the corpus. As between creditors by mortgage and general creditors, the former in nonrailroad cases are ordinarily entitled to priority of payment out of the mortgaged property by their contract, and by law of the land. The law recognizes the validity of contracts of mortgage and enforces them subject to certain regulations for the protection of subsequent purchasers or encumbrancers. The lien of the mortgagee attaches not only to the land in the condition in which it was at the time of the execution of the mortgage, but as changed or improved by accretions or by labor, expended upon it while the mortgage is in existence. Creditors having debts created for money, labor or material used in improving the mortgaged property acquires, on that account, no legal or equitable claim to displace or subordinate the lien of the mortgage for their protection.⁷⁴

In most states, however, are found extensive lien laws⁷⁵ which, when the provisions are properly carried out, protect a supply dealer and a laborer for supplies and labor furnished within one year of the receivership; and also, without any formal filing of a lien, laborers and employees have certain priorities for labor performed within three months prior to the time such receiver is appointed.⁷⁶

Some states recognize a preferential claim and lien for labor performed for a nonpublic service corporation which goes into the hands of a receiver, even if there is no state statute providing for such a preference or lien.⁷⁷ And in

⁷⁴ Metropolitan Trust Co. v. T. V. & C. R. R. Co., 103 N. Y. 245, 8 N. E. 488.

⁷⁵ See Ohio General Code, sec. 8308 et seq.

⁷⁶ See Ohio General Code, sec. 8339.

⁷⁷ Drennen v. Mercantile Deposit Co. (1896), 115 Ala. 592, 23 So. 164; Le Hote v. Boyet (1904), 85 Miss. 636, 28 So. 1.

Alabama an assignee of labor claims was allowed to assert such a preference.⁷⁸ These equitable liens are allowed in spite of decisions in the states that even the statutes creating preferred claims do not create liens.⁷⁹

(a) Six Months' Claims Applied to Street Railway. The District Court of the United States for the Southern District of New York,⁸⁰ and the United States Circuit Court of Appeals, Second District,⁸¹ extend the so-called six months' rule to street railway companies. The Supreme Court of Indiana does likewise, saying: "Both are transportation companies, both common carriers, and if suspension in operation of the one will be an injury to the general public, the suspension of the other will be an injury to the local public, and the difference is one of degree and not of kind."⁸² The Supreme Court of Massachusetts refuses to allow a claim for power furnished to a street railway company under the six months' rule, but does not say the rule may not hold for certain claims.⁸³

(b) Six Months' Claims Rule Applied to Heating Company. The six months' rule has, by the Maryland courts, been applied to claims for coal accruing against a heating company less than six months prior to the receivership.⁸⁴

(c) Six Months' Claims Rule when Applied to Light and Water Company. The six months' rule has been applied to a light and water company operating a system of waterworks and electric lighting for a city on the ground that it was a quasi public corporation.⁸⁵ The contrary is held in Arkansas

⁷⁸ *Drenner v. Mercantile Deposit Co.* (1896), 115 Ala. 592, 23 So. 164.

⁷⁹ See ch. XIX and ch. XX, *supra*, also ch. II, sec. 38, *supra*, and *Seymour v. Berg* (1907), 227 Ill. 411, at 420, 81 N. E. 339; *McDaniels v. Osborne* (1905), 160 Ind. 1, at 5; 66 N. E. 42; *Central Sav. B. v. Newton* (1915), 59 Colo. 150, 147 Pac. 690.

⁸⁰ *Pennsylvania Steel Co. v. New York City Ry. Co.*, 208 Fed. 168. See extension to municipal water company, *Crane v. Fidelity Trust Co.* (1917), 238 Fed. 693, at 702.

⁸¹ *Pennsylvania Steel Co. v. New York City Ry. Co.*, 216 Fed. 458.

⁸² *Cambria Iron Co. v. Union Trust Co.* (1899), 154 Ind. 291, at 305, 56 N. E. 665.

⁸³ *Old Colony Trust Co. v. Medfield & Medway St. Ry.* (1913), 215 Mass. 156, at 160, 102 N. E. 484. See *Crane v. Fidelity Trust Co.* (1917), 238 Fed. 693.

⁸⁴ *Homer v. Baltimore Refg. & Heating Co.* (1912), 117 Md. 411, 84 Atl. 176.

⁸⁵ *Citizens Trust Co. v. National Equipment Co.* (1912), 178 Ind. 167, 98 N. E. 865, 178 Ind. 167; *City Trust Co. v. Sedalia L. & T. Co.* (1912), 195 Fed. 845.

where they have a statute providing for a lien for work done in the construction of a plant, and a failure to follow these statutes means the loss of the lien even if the property is a water company and goes into the hands of a receiver.⁸⁶

Held that the claim of a casualty company which went on an appeal bond of an electric plant and light company was entitled to preference in the distribution of the proceeds of a receiver's sale of mortgaged property, such preference being over mortgage lienholders on the ground that the supersedeas bond avoided the loss or destruction of rights granted by the company to the bondholders or mortgagees at the request of the company.⁸⁷

Held by Pollock, D. J., United States District Court, Western Division of Missouri, Central Division, in 1912, that claims for payment of one-half cost of maintaining flagman and for coal sold to an electric light plant and street railway company were not entitled to preference against a first mortgagee.⁸⁸

§ 845. Payment of Expenses of Receiver Running a Business. The object of appointing a receiver is to preserve the property for the benefit of all parties concerned,⁸⁹ or to realize it. Sometimes this object is best attained by continuing the business. When this is done, the court has a right, although it should exercise such right with great caution, to make the expenses of such business chargeable upon the corpus of the property, if the income is not sufficient to pay the same. Of course, the expenses must be charged first upon the net income; but when that is not sufficient, they may be charged upon the property itself, or upon the proceeds after sale.⁹⁰

⁸⁶ *Martin v. Blytheville Water Co.* (1914), 115 Ark. 230, 170 S. W. 1019.

⁸⁷ *City Trust Co. v. Sedalia L. & T. Co.* (1912), 195 Fed. 845, at 849. See *contra*, 165 Fed. 485, 76 Fed. 74.

⁸⁸ *City Trust Co. v. Sedalia L. & T. Co.* (1912), 195 Fed. 845.

⁸⁹ *Viola v. Anglo-American* (1912), 11 Ch. D. 311.

⁹⁰ *Knickerbocker v. The McKinley C. & M. Co.* (1898), 172 Ill. 535, at 548, 50 N. E. 330. See *Cake v. Mohun* (1896), 164 U. S. 311, 41 L. ed. 447, 17 S. C. Rep. 100.

When a business is run under a receiver and the receiver makes a profit, the problem of distributing the funds is of little more difficulty than if the business were sold out at once. If the business is continued, it is only continued on the theory that, by so doing, goodwill, trade and other intangible value can be preserved and a better settlement made for the creditors or a better sale made for the creditors.

When purchases are made by the receiver for cash belonging to the trust fund, it may be said that these purchases represent the cash, and the proceeds of such purchases should be dealt with as the original funds.

But when purchases are made on credit and the business is sold out, then what standing have the receiver's creditors? The proceeds derived by the receiver from the sales of goods which he himself purchased, it would seem, in equity and good conscience, belong to the persons from whom he purchased the goods.⁹¹ The profits arising from such sales and the money obtained from the sale of old stock evidently belonged to the creditors of the original business, those who were creditors when the receivership was created. On this theory, it is manifestly the duty and it is only equitable and just that the receiver pay to the creditors from whom he bought goods the amounts he contracted to pay.

Suppose, however, that the business is run at a loss and it is finally sold out. It would seem that the proceeds of the goods bought by the receiver should go to the creditors who actually sold goods to the receiver. If the receiver was legally and properly appointed and if the court authorized the running of the business, apparently, under such circumstances, the receiver has power to incur obligations for supplies and materials incidental to running the business.⁹² Such authority is not derived from a simple order to take and preserve the property.⁹³

⁹¹ *Diamond Match Co. v. Taylor* (1896), 83 Md. 394, at 407, 34 Atl. 1015.

⁹² *Barton v. Barbour* (1881), 104 U. S. 126, at 135, 26 L. ed. 672; *Thompson v. Phoenix Ins. Co.* (1890), 136 U. S. 287, at 293, 34

L. ed. 408, 10 S. C. Rep. 1019; *Cake v. Mohun* (1896), 164 U. S. 311, at 316, 41 L. ed. 447, 17 S. C. Rep. 100. See *In re J. B. & J. M. Cornell Co.* (1912), 201 Fed. 381.

⁹³ *Face v. Hall* (1914), 183 Mich. 22, 148 N. W. 777.

This being so, the balance due the creditors of the receiver would have to come out of the income in the hands of the receiver from other sources and possibly out of the corpus. If necessary to make such a payment out of the corpus when there are liens on the corpus, other problems present themselves. See this matter discussed at length under ch. XXIX, "Liabilities of Receiver."

§ 846. Payment of Expenses of Receiver Running a Business on Credit. It very often happens when a receiver is ordered to conduct or run a business, that there are little or no funds on hand available to run it, neither is the receiver ordered to borrow money or issue receiver's certificates.⁹⁴

In *Thornton v. Highland Ave. & Belt Railway Co.*,⁹⁵ a receiver was appointed to run a hotel. The court made no order by which the receiver was entitled to raise money to "conduct and run the hotel." By the decree appointing him he was authorized to run the hotel, "and for this purpose the receiver is authorized to make such purchases as may be necessary." "When the order was made, the court knew its owner had no money, and it made no provision for raising any. How was the receiver to perform his duty unless he purchased on credit? We are of opinion that the order gave the power and the discretion of the receiver to make purchases, if necessary, upon a credit."⁹⁶

This court further held that the sale of the goods was made to the receiver in his official character and it is a proper charge upon the income first, and if there was no income, then upon the corpus. It must be noted in the above case there is no mention of any liens against the corpus. If there are, this raises the very important question whether such charges for

⁹⁴ See *In re J. B. & J. M. Cornell Co.* (1912), 201 Fed. 381; *Teutonia Bk. & T. Co. v. Security Brew. Co. & T. Co. v. Security Brew. Co.* (1915), 137 La. 1046, at 1058, 69 So. 833; *German Nat. Bank v. Young* (1914), 114 Ark. 370, 160 S. W. 1178.

⁹⁵ *Thornton v. Highland Ave., etc.* (1894), 94 Ala. 353, at 357, 10 So. 442.

⁹⁶ See *Another Hotel Case, Cake v. Mohun* (1876), 164 U. S. 311, 41 L. ed. 447, 17 S. C. Rep. 100.

running the business shall take the precedence over liens properly existing at the time of the receivership. It must also be said that such an order to run the business as was given in the Alabama case, and as is very often given, is most broad, and subjects the corpus of the property to great risks under an unsuccessful (as far as making money) receivership.

An order to run a business should include some definite instructions and some restrictions as to the receiver incurring debts. The only limitation and restriction which would obtain in a general order to run the business is the reasonableness of the expenditure. Whether the charge for the groceries (or other charges) were reasonable, and whether necessary, is a matter of proof to be taken under the direction of the court appointing the receiver.⁹⁷

An order to borrow money to run a business must be specific.⁹⁸

§ 847. Payment of Expenses of Receiver Running a Business at a Loss.⁹⁹ In a suit instituted by a debenture holder of a company, on behalf of himself and the other debenture holders, against the company and trustees of a deed, by which the leasehold colliers and the plant of the company were assigned to trustees to secure the payment of the debentures to enforce the security, a receiver and manager was appointed. He worked the collieries for some years at a loss. Ultimately the property was sold, the plaintiff having the conduct of the sale, and the purchase money was paid into court. Distribution was ordered as follows:

First. The cost of realization of the property, because it must be realized by someone in order that it may be distributed, and whoever has realized it and brought the proceeds

⁹⁷ Thornton v. Highland Ave., etc. (1894), 94 Ala. 353, at 358, 10 So. 442.

⁹⁸ Teutonia Bk. & T. Co. v. Security Brew. Co. (1915), 137 La. 1046, at 1058, 69 So. 833.

⁹⁹ See Teutonia Bk. & T. Co. v. Security Brew. Co. (1915), 137 La. 1046, at 1058, 69 So. 833; German Nat. Bk. v. Young (1914), 114 Ark. 370, 169 S. W. 1178; Knickerbocker v. The McKinley C. & M. Co. (1898), 172 Ill. 535, 50 N. E. 330.

under the control of the court has really constituted the fund which has to be distributed for the benefit of the receiver and everyone else who is entitled. These costs must therefore be paid in priority to the receiver.¹ An abortive attempt to sell was held to have been one step toward the realization of the property.

Second. The balance due to the receiver and manager, including his remuneration and his costs of the suit. The receiver is the officer of the court and the court is bound to see that he is paid, just as if, had the trustees employed a manager, they would have been bound to pay him without regard to the sufficiency of the estate to meet the claims upon it. The receiver must be indemnified so far as the assets under the control of the court enable this to be done.

Third. The costs, charges and expenses of the trustees of the deed who were trustees for the debenture holders to collect their money, etc., and codefendants in the suit.

Fourth. The costs of the two plaintiffs in the suit *pari passu*, a new plaintiff having been substituted for the original.

Fifth. The debenture holders, if any money left.²

For an extended discussion of the subject, see ch. XXIX, "Liabilities of Receivers."

§ 848. Payment of Expenses of Running a Business without Authority. When a receiver of a corporation is authorized by the court to administer and manage its affairs for the best interests of all parties, the Supreme Court of Louisiana has held that such an authority did not specifically authorize the receiver to carry on the company as a going concern, and that losses incurred by the receiver in carrying on the operations of the company should be borne by the receiver, that that amount should be deducted from the commissions otherwise falling to the receiver.³

¹ *Batten v. Wedgewood* (1884), 28 Ch. D. 325.

² *Batten v. Wedgewood* (1884), 28 Ch. D. 325.

³ *Villere v. New Orleans Pure Milk Co.* (1909), 122 La. 717, at 743, 48 So. 162.

§ 849. Payment of Receiver's Fees and Costs when No Funds. It is true that ordinarily it is the usual practice to charge the funds or estate in the receiver's hands with all costs and expenses, including compensation of receiver, but how can this be done in cases where no funds or estate exist? In such cases must the honest creditors of the receiver be entirely defeated in their just claims? Such a doctrine is entirely repugnant to both right and reason. Where there is no fund out of which the expenses can be paid, or the fund is not sufficient, the usual rule is that the party at whose instance the receiver was appointed should be required to provide the means of payment; and it is proper to tax such costs against him in like manner, as when a receiver is held to have been appointed without any probable cause for so doing.⁴

§ 850. Payment of Receiver's Fees and Costs when Appointment Reversed. The federal constitution provides that a citizen shall not be deprived of his life, liberty or property without due process of law. And due process of law requires a proceeding which proceeds upon inquiry and renders judgment only after trial. It certainly will not sanction the forfeiture of a person's property to pay the expenses of a proceeding taken against him, which is afterward set aside at his instance as unwarranted.⁵

There might be cases where a receiver was erroneously appointed but not under circumstances as to make the appointment absolutely void, which would warrant an order that his disbursements be paid out of the funds, as for example, where the property consisted of a herd of cattle for which the

⁴ *Tome v. King* (1885), 64 Md. 166, at 184, 21 Atl. 279; *Knickerbocker v. McKinley C. & M. Co.* (1896), 67 Ill. App. 291, at 295; *Welch v. Renshaw* (1900), 14 Colo. A. 526, 59 Pac. Rep. 967; *Ephriam v. Pac. Bk.* (1900), 129 Cal. 589, at 592, 62 Pac. 177.

⁵ *Weston v. Watts* (1887), 45 Hun 219, at 222; *P. M. Bank v. Bayne* (1893), 140 N. Y. 321, at 330, 35 N. E. 630; *Hawes v. First Nat. Bk.* (1915), 229 Fed. 51, at 59, and cases cited; *Phillips v. Hudson Film Co.* (1913), 143 N. Y. S. 759, at 761, and cases cited.

receiver had to buy fodder. In such a case it would be fair and just to charge the successful party with the cost of feeding, for he would have had to incur it if the animals had remained in his own custody. But commissions and all disbursements except such as would have been necessary if the custody of the property had remained unchanged would seem to stand on a different footing.⁶

If the receiver takes property in violation of the owners' rights to that property, the property should not bear the payment of costs incurred in the attempt to deprive the owner of his property.⁷

The receiver when duly appointed by the court is an officer of the court. He is not a party moving the court for his appointment and has no beneficial interest in the litigation. He should, therefore, in equity and good conscience be compensated for his services and be reimbursed for his expenses.⁸

If the court is without jurisdiction to appoint a receiver and has no property with which to pay anyone, the complainant who filed the bill and at whose instance the receiver was appointed has to respond and pay the costs of the receivership. "The ruling of *Atlantic Trust Co. v. Chapman*, 208 U. S. 360, does not apply to such a case, because courts can not seize property without jurisdiction and then claim jurisdiction over the property because it is in the possession of the court."⁹

§ 851. Power of Court of Equity to Displace Liens. "If a fund for the payment of debts be created under an order or decree in chancery, and the creditors come in to avail

⁶ *Weston v. Watts* (1817), 45 Hun 219, at 224.

⁷ *Phillips v. Hudson Film Co.* (1913), 143 N. Y. S. 759, and cases cited; *Howe v. Jones* (1885), 66 Iowa 156, at 162, 23 N. W. 376; *Frick v. Fritz* (1904), 124 Iowa 529, at 532, and cases cited; *Hawes v. First Nat. Bk.* (1915), 229 Fed. 51, at 59, and cases cited.

⁸ *Howe v. Jones* (1885), 66 Iowa 156, at 162, 23 N. W. 376; *Weston v.*

Watts (1887), 45 Hun 219; *Einstein v. Lewis* (1894), 54 Ill. App. 520, at 522; *Myers v. Frankenthal* (1894), 55 Ill. App. 390. Even when the state court had no power to appoint receiver the bankruptcy court allowed such receiver compensation for preserving the assets, *State of Missouri v. Angle* (1916), 236 Fed. 644, at 653.

⁹ *Hawes v. First Nat. Bk.* (1915), 229 Fed. 51, at 59.

themselves of it, the rule of equity then is that they shall be paid in *pari passu* or upon a footing of equality. But when the law gives priority, equity will not destroy it and especially where legal assets are created by statute (as a judgment lien) they remain so, though the creditors be obliged to go into equity for assistance. The legal priority will be protected and preserved in chancery."¹⁰ And yet courts of equity have power to displace liens under special circumstances seems beyond question.¹¹ The authority to displace liens is an exception and not the rule and is usually restricted to cases of railroads and other like corporations of quasi public character.¹²

Incumbrancers take knowing that the estate may be subject to proper costs to be incurred in an incumbrancer's suit and when a receiver is appointed as much for their benefit as for the mortgagor, then the incumbrancers must bear their part of the receiver's costs and expenses.¹³ The law on the subject seems to be most satisfactorily stated by Pearson, J.,¹⁴ as reported in this chapter under sec. 847 *supra*, "Payment of Expenses of Running a Business at a Loss."

"The exercise of the power of the court to displace liens can only be sustained on the ground of actual necessity, and surely there can be no necessity to append, as an incident to running a railroad, a lien for damages that displaces existing contracts. The party has a right to be paid from the fund remaining after satisfying prior rights. He has a right to be allowed his claim to be paid from an excess remaining. He has the same right against the property which he could

¹⁰ Kent, J., in *Codwise v. Gelston* (1812), 10 Ch. (N.Y.) 520; *Wisswall v. Sampson* (1852), 14 How. 55, at 65, 14 L. ed. 322.

¹¹ *Davenport v. Alabama, etc., Ry.* (1875), 7 Fed. Cas. p. 8, Case No. 3588.

¹² *Stacey v. McNicholas* (1915), 148 Pac. 67, at 71.

¹³ *Conrand v. Hammer* (1844), 9

Beav. 3; *Brinklow v. Singleton* (1904), 1 Ch. D. 656; *Viola v. Anglo-American* (1912), II Ch. D. 311.

¹⁴ Pearson, J., in *Batten v. Wedgewood* (1884), 28 Ch. D. 325; also in *Batten v. Wedgewood* (1884), 52 L. T. R. 313.

have had if the road had been run by the president and directors when his right accrued.''¹⁵

Where a court of equity lawfully takes property into its possession for distribution among those entitled to it, the necessary costs and expenses for the protection of that property or fund are of necessity a lien upon the fund, superior to that of the person who was its former owner, or to those who succeeded to the former owner's rights.

Where there was a specific lien upon the property, created before the receiver took possession, and where the receiver's possession is subordinate to that lien, the lienholder's interest not vesting in the receiver, then, of course, the lien comes in ahead of the receiver's claim for compensation or disbursements.

Where, however, the lienor was a party to the proceedings, and where the receiver is ordered to take into his possession the property of the lienor as well as of the former owner, to protect that property for the lienor and others interested in it, then the lienor's interest becomes chargeable with the proportion of the expenses necessary to protect the property, or to change it into money for the lienor's benefit.

Property taken by a receiver, subject to attachment liens thereon, the lienor being a party to the proceeding, is chargeable, in the first instance, with its proportion of the expenses necessary to protect the property or to change it into money for the lienor's benefit, but not with state or city taxes due from the corporation.¹⁶

§ 852. Payment of Costs of Realization against Incumbrancers. "We are all aware that when incumbered property or property on which there is a lien is sold, then the incumbrancer or person claiming the lien can not assert the propriety of the sale and ask for payment out of the proceeds of sale

¹⁵ *Davenport v. Alabama, etc., Ry.* (1875), 7 Fed. Cas. p. 8. See *United States & Mexico T. Co. v. Kansas City M. & O. Ry.* (1917), 240 Fed. 505.

¹⁶ *Matter of Atlas Const. Co.* (1897), 19 N. Y. App. Div. 415, 46 N. Y. S. 467. See *Stacy v. McNicholas* (1915), 76 Ore. 167, 148 Pac. 67, at 71, and cases cited.

without allowing to be deducted in the first instance the costs which have been incurred in realizing those proceeds. If you come here to claim the benefit of the sale so as to get payment, it follows that you must pay the costs incurred in producing the sum which is available for payment. That is generally understood by costs of realization, and those are the costs which take precedence even of a first mortgagee, although the sale may not have been made by him or even in the first instance with his concurrence. Those costs include sometimes such things as the auctioneer's fees, the money necessary for preparing the condition of sale and so on, according to the nature of the property. But they are not understood to mean anything more."¹⁷ If receivers are appointed solely at the instance and for the benefit of second mortgage bondholders, and that trustees who sell the property are appointed to sell exclusively for the benefit of the same parties, the first mortgage bondholders should not be made to pay the commissions and expenses allowed.¹⁸

In such a case the court may well allow, as against the mortgagee, the actual cost of advertising and conducting the sale of the property, and as to the amount the mortgagee is held to be entitled to is the amount of the mortgage with interest and actual court costs of establishing claim.¹⁹

§ 853. Payment of Costs of Preservation by Receiver's Suits against Incumbrancers. Incumbrancers take knowing that the estate may be subject to proper costs to be incurred in an incumbrancer's suit, and when a receiver is appointed as much for their benefit as for the mortgagor, then the incumbrancers must bear their part of the receiver's costs and

¹⁷ *Lathom v. Greenwich Ferry Co.* (1895), 72 L. T. R. 793. See *Lembeck v. Jarvis Terminal, etc.* (1904), 68 N. J. Eq. 352, 59 Atl. 360; *Central Trust, etc., v. Chester County Electric Co.* (1911), 9 Del. Ch. 247, 80 Atl. 801; *Walter v.*

Peninsular Cut Stone Co. (1912), 9 Del. Ch. 374, 82 Atl. 961.

¹⁸ *Tome v. King* (1885), 64 Md. 166, at 183, 21 Atl. 279. See *Lammon v. Giles* (1887), 3 Wash. Ter. 117, at 123, 13 Pac. 417.

¹⁹ *Pickering v. Richardson* (1910), 57 Wash. 117, 106 Pac. 614.

expenses.²⁰ However, it is for the court to determine whether proceedings shall be taken at the expense of the mortgaged property. The receiver can not do this of his own initiative, but would run the risk of his costs being disallowed if he did not obtain the direction of the court,²¹ and neither mortgagor nor mortgagee has any absolute right to insist upon an action being brought or to prohibit it being brought by the receiver at the expense of the mortgaged property.²²

§ 854. Payment of Unsecured Claims for Damages against Incumbrancers. The lien created by mortgagees in favor of bondholders is a vested right, and in the case of railroads subject only to the payment of a few unsecured matured claims for operating expenses, equipment and the like, necessary to equitably restore to unsecured creditors that which, by the nonpayment of their claims when due, amounted to a diversion of the funds in favor of the mortgage creditors.²³

“Unsecured claims for damages arising from negligence of the mortgagor company before the appointment of receivers, had not, before the decrees were made in this case, or since then, been recognized as conferring upon the holders an equity for their payment over the mortgage creditors. On the contrary, such claims had been declared by this court, when the learned chancellor who passed the decrees in this case was one of its honored members, not to be entitled to any such preferential right.”²⁴

§ 855. Payment of Costs of Running a Business against Incumbrancers. It is a recognized rule of law that the court

²⁰ *Courand v. Hammer* (1846), 9 Beav. 3; *Brinklow v. Singleton* (1904), 1 Ch. D. 656. See *In re J. B. & J. M. Cornell Co.* (1912), 201 Fed. 381.

²¹ *Bristowe v. Needham* (1847), 2 Phil. Ch. 190; *Wynne v. Lord Newborough* (1790), 3 Bro. Ch. 88.

²² *Viola v. Anglo-American* (1912), 11 Ch. D. 311.

²³ *Atchison, T. & S. F. Ry. v. Osborn* (1906), 148 Fed. 606, at

610, citing *Kneeland v. Trust Co.*, 136 U. S. 89, at 97, 34 L. ed. 379, 10 S. C. Rep. 950; *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339; *Greggs v. Metropolitan*, 197 U. S. 183, 49 L. ed. 717, 25 S. C. Rep. 415; *Southern Ry. v. Carnegie*, 176 U. S. 257, 44 L. ed. 458, 20 S. C. Rep. 347.

²⁴ *Atchison, T. & S. F. Ry. v. Osborn* (1906), 148 Fed. 606, at 611, citing *St. Louis T. Co. v. Riley*, 70 Fed. 32, 30 L. R. A. 456; *Atlantic T. Co. v. Dana*, 128 Fed. 259.

can authorize a receiver to run a business not only of a railroad company but of a private corporation,²⁵ and when the business is run, proper charges of the receiver in so running the business are first a charge against the income and then against the corpus.²⁶ But a very complicated situation arises when the corpus of the property is under mortgage or other lien.

Andrews, J., in *Raht v. Atrill*, distinguishing between mortgage creditors of railroads and mortgage creditors of private corporations, says: "As between creditors by mortgage and general creditors, the former are entitled to priority of payment out of the mortgaged property by their contract and by law of the land. The law recognizes the validity of contracts of mortgage and enforces them subject to certain regulations for the protection of subsequent purchasers or incumbrancers."

"The act of the court in taking charge of property through a receiver is attended with certain necessary expenses of its care and custody, and it has become the settled rule that expenses of realization and also certain expenses which are called expenses of preservation may be incurred under the order of the court on the credit of the property;²⁷ and it follows from necessity, in order to the effectual administration of the trust assumed by the court, that these expenses should be paid out of the income or, when necessary, out of the corpus of the property before distribution or before the court passes over the property to those adjudged to be entitled."

Mortgagees and other lienholders have certain rights, and although the public nature of railways seems to be the reason of and the excuse for saddling the payment of certain debts contracted before the receivership, and also certain debts

²⁵ *Raht v. Atrill* (1887), 106 N. Y. 423. See 201 Fed. 381, at 387, 13 N. E. 282.

²⁶ *Knickerbocker v. McKinley* (1898), 172 Ill. 535, 50 N. E. 330;

Skep v. Hancock (1747), 3 Atk. 564.

²⁷ In *re* Regent's Canal Iron Works (1887), L. R. 3 Ch. D. 411, at 427; *Raht v. Atrill* (1887), 106 N. Y. 423, at 435, 13 N. E. 282.

contracted after the receivership on the property as a charge in priority to the lien already there, nevertheless, the rights of lienholders in other than railroad receivership stand on a footing somewhat different. We believe the weight of authority is for strictly guarding the integrity of contracts and maintaining a rigid rather than a liberal construction of the power of the court to subject property in the hands of receivers to charges, to the prejudice of creditors, subverting the priority of liens which are acquired according to the general rules of law.²⁸

When the lienholders are not moving parties for the receivership and when they do not do anything to estop them from complaining of the receivership charges, can they be charged with the payment of any part of the costs, including receiver's fees and cost of running the business? Wilson, J., in *Eich v. McDonald*²⁹ held that the mortgagees, not being parties moving for the receivership, could not be charged with the payment of any part of the receiver's fees, and could only be called upon to pay such costs as would be fairly charged against them in foreclosure proceedings.³⁰

In *Sturwold v. Geo. Vehr*,³¹ Smith and Hunt, JJ., say that, if within a reasonable time after having been made a party, Sturwold, who was a chattel mortgagee, in any way had disclaimed his intention to acquiesce in the running of the business, there would be no ground for holding that the property covered by the chattel mortgage could be subjected to the expenses of the receivership, either before or after the time at which he was made a party.³² Yet in this case we are of the opinion that there was an acquiescence by Sturwold in the

²⁸ In re J. B. & J. M. Cornell Co. (1912), 201 Fed. 381; *Raht v. At-rill* (1887), 106 N. Y. 437, 13 N. E. 282.

²⁹ See *Berwind-White Coal, etc., v. Met. S. S. Co.* (1910), 183 Fed. 250; *Eich v. McDonald* (1895), 34 Cin. (Ohio) Law Bull. 228. See In re J. B. & J. M. Cornell Co. (1912), 201 Fed. 381.

³⁰ See *Berwind-White C. M. Co. v. Met. S. S. Co.* (1910), 183 Fed. 250.

³¹ *Sturwold v. Geo. Vehr* (1897), 5 Ohio N. P. 37.

³² See In re Benwood Brew. Co. (1913), 202 Fed. 326.

order made to run the business and that he is estopped now to claim that the court had no authority to make it, and he, the chattel mortgagee, was obliged to pay out of the proceeds of the mortgaged chattels due him, not only the costs of realization of the property, but the losses sustained by the receiver in running the business.

§ 856. Payment of Costs of Running a Railroad against Incumbrancers. Necessary supplies purchased on credit by the receiver of a railroad, appointed in foreclosure proceeding, if not paid out of net earnings before the sale, are a charge upon the fund realized from the foreclosure sale.³³ The power of a court to appoint managing receivers of such property as a railroad when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property and make the same chargeable as a lien thereon for its repayment can not, at this day, be seriously disputed. It is a part of that jurisdiction always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands.³⁴

When the mortgagee procures the appointment of a receiver with power to control and operate the mortgaged railroad, he can not well object to the depreciation of his security by expenses incurred for these purposes, but he may properly seek to have excluded any previous ones. If the order directs the receiver to maintain and keep in repair and operate the railroad and to pay the necessary expenses of so doing, and is made on the mortgagee's request, he must abide by it.³⁵

For full discussion of preference given to claims for supplies, labor, etc., for six months previous to receivership, see sec. 842 et seq., *supra*.

³³ *Kneeland v. Bass Foundry & Mach. Wks.* (1891), 140 U. S. 592, 35 L. ed. 543, 11 S. C. Rep. 857.

³⁴ *Wallace v. Loomis* (1877), 97 U. S. 146, at 162, 24 L. ed. 895.

³⁵ *Met. Trust Co. v. T. V. & C. R. R.*, 103 N. Y. 245, 8 N. E. 488.

In a case wherein receiver's certificates issued by a railroad receiver were made by the court, a first "lien" (as the court expressed it) on the property and its proceeds, and on all the net income derived from its operation "after the payment of expenses and costs of administration," it was held that a claim for personal injuries happening during the operation of the road by the receiver was an expense incurred in and by reason of the operation of the road, and should be charged upon the corpus of the property, failing income sufficient to pay it.³⁶

§ 857. Payment of Receiver's Fees against Incumbrancers. When incumbered property is placed in the hands of a receiver, it frequently happens that it is sold and the purchase money when paid into court is not sufficient to pay the receiver and leave a balance to pay the claims of lienholders in full or in part. The rule in such cases seems to be to pay the receiver his remuneration and costs before distributing the assets.³⁷ Receivers and managers are entitled to their just charges and expenses incurred in the management of the estate in which they may have been appointed in priority to debenture holders and other persons holding charges on the property.³⁸ When a receiver has acted in the realization of the assets for the benefit of everyone concerned even though the management and realization of the property turned out disastrously, the receiver was allowed his remuneration and indemnity for his costs and expenses properly incurred out of the assets in priority to those who had advanced money to the receiver.³⁹

Said the Supreme Court of Oregon: "In appointing a receiver of a corporation not quasi-public in character, or authorizing its receiver to continue its business, a court of equity has no powers in the absence of the consent of prior

³⁶ *Anderson v. Condict* (1899), 93 Fed. 349.

³⁷ *Batten v. Wedgewood* (1884), 28 Ch. D. 325, 52 L. T. R. 213; *Courand v. Hammer* (1846), 9 Beav. 3. See *Central T. & Sav. Co. v. Chester Co. Elect. Co.* (1911), 9 Del.

Ch. 247, 80 Atl. 801; *Walter v. Peninsular Cut Stone Co.* (1912), 9 Del. Ch. 374, 82 Atl. 961.

³⁸ *Strapp v. Bull* (1895), C. A. 11 Ch. D. 1, at 9.

³⁹ *In re Gladsir Copper, etc.* (1906), 1 Ch. D. 365.

contract lien creditors to decree that the indebtedness of the receiver shall take precedence over such prior contract liens as mortgages and other incumbrances.”⁴⁰

§ 858. Payment of Setoff or Counterclaims. In case a receiver collects money due the defendant for a sale or other claim which was due the defendant before the receiver took hold, the receiver collects a chose in action. The chose in action is due under a contract made by the defendant subject to all equities by way of setoff or otherwise which exist between the defendant and the debtor.⁴¹ The receiver acquires no greater rights under the chose in action than the corporation or other defendant itself possessed and the chose in action which passed to the receiver is enforceable by him only as it could have been enforced by the defendant at the time of appointment.⁴²

But in a case of a debt due for a sale made by a receiver, the receiver is the party to the contract of sale, the action for that reason must be brought in his own name and is not subject to any equities by way of setoff or otherwise which could be set up by the defendant.⁴³

DISTRIBUTION

§ 859. Classification of Distributees in Receivership Cases.

(a) Distributees of the Original Property or Its Realization.

The purpose of appointing a receiver is to preserve property or to realize it; that is, to make it available at the termination of the controversy for those whom the court shall say are entitled to the property or the funds produced by the realization of the property, after proper payments have been made

⁴⁰ *Stacey v. McNicholas* (1915), 76 Ore. 167, 148 Pac. 67, 76 Ore. 167; *United States Investment Corp. v. Hospital*, 40 Ore. 523, 64 Pac. 644, 67 Pac. 194.

⁴¹ *Rochester Tumbler Works v. M. Woodbury Co.* (1913), 215 Mass. 194, at 198, 102 N. E. 438.

⁴² *Knebler v. Haines* (1910), 229 Pa. St. 274, at 278, 78 Atl. 141.

⁴³ *Rochester Tumbler Works v. M. Woodbury Co.* (1913), 215 Mass. 194, at 198, 102 N. E. 438; *Singerly v. Fox*, (1874), 75 Pa. St. 112; cited in *Knebler v. Haines* (1910), 229 Pa. St. 274, at 278, 78 Atl. 141.

to the receiver and others. The parties to whom the court may properly order a distribution of the original property or funds produced from the realization thereof may be broadly classified as follows:

First. To lienholders or incumbrancers, because the appointment of a receiver does not ordinarily affect any right or interest in the property or divest liens or incumbrances on the property.

Second. To parties to the original action to whom the court shall finally adjudge the property or part thereof or its realization, and order distribution.

Third. To intervenors to whom the court shall finally adjudge the property or a part thereof or its realization, and order distribution.

Fourth. To claimants who have not intervened but who have presented their claims to the receiver or a master, and had them properly allowed by such receiver and master, and the allowance confirmed by the court.

Fifth. To the original defendant the original property or the funds derived from the realization thereof, if the court shall ultimately determine he is entitled thereto, or to the defendant the balance of the property or the realization thereof if the same is not all necessary to pay all the claims against the same.

(b) Distributees of Rents and Profits from Original Property. When the purpose of appointing a receiver is to have him take possession on behalf of a mortgagee and collect the rents and profits, and the other mortgagees do not become parties, then the receiver, when he takes possession and collects the rents and profits, does not in all cases have to account to the other mortgagees for the rents and profits until they intervene.⁴⁴ In such a case the mortgagee who obtains the appointment of a receiver is entitled to the rents and profits,

⁴⁴ In re Metropolitan, etc. (1912), (1892), 3 Ch. D. 94. at 100 to 103; W. N. 219; Thomas v. Brigstoeher Preston v. Tunbridge, etc. (1903), (1827), 4 Russ. 64; In re Hoare 2 Ch. 323, at 325.

and such rents and profits are therefore not divided *pari passu* among all distributees.⁴⁵

Said the United States Circuit Court of Appeals, Eighth Circuit, in 1915, speaking through Sanborn, C. J., as follows: "Where the mortgaged property of a railroad company is placed in the hands of a receiver before the commencement of a suit to foreclose the mortgage, and a subsequent suit for that purpose is commenced, the proceedings do not impound the income for the benefit of the mortgaged bondholders until either a demand has been made of the receivers to surrender the income and the administration of the property, which has been refused, or an intervention has been made in the earlier suit, or an application for an order to impound the income for the benefit of the bondholders has been made to the court, or the receivership has been extended to the later suit, or receivers have been appointed therein."⁴⁶

§ 860. General Rules as to Priorities. Said the Supreme Court of Massachusetts in 1913: "When called upon to determine the rights of different classes of creditors entitled to participation in the distribution of assets of an insolvent corporation, a court of equity, even in the absence of statutory provisions expressly directing the order in which debts shall be ranked, will adopt and follow wherever practicable the rule prescribed by statute relating to the allowance of debts in insolvency or bankruptcy."⁴⁷

Expenses contracted by a receiver for labor and supplies which were necessary in order to care for and preserve the ditches, machinery and other property of a mine were held to come in the category of costs of preservation of the property,

⁴⁵ For a full discussion of this phase of receivership and citation of cases, see ch. IX, *supra*.

⁴⁶ *Chicago & A. R. Co. v. Trust Co.* (1915), 225 Fed. 940, at 942, and cases cited.

⁴⁷ *Old Colony Trust Co. v. Medfield & Medway St. Ry.* (1913), 215

Mass. 156, at 163, 102 N. E. 415, citing *Jones v. Arena Pub. Co.*, 171 Mass. 22, at 29, 50 N. E. 15; *Franklin County Nat. B. v. First National Bk. of Greenfield*, 138 Mass. 515, at 518; *Story, Eq. Jur.* (13th Ed., sec. 64). See *Bankruptcy Act of 1898*, sec. 64b; *In re Bryne*, 97 Fed. 762.

and were payable as a first lien on the property, whereas expenses of operating the mine were not to take priority to lien creditors who did not consent to the proceedings.⁴⁸

Where a water lease is of subsequent date to a mortgage, and the property mortgaged goes into the hands of a receiver, even though the receiver had the right to the use of the water and they did not use any water, the claims of the water lessor could not take precedence over the claims of the mortgagee in the distribution of the estate.⁴⁹

§ 861. Effect of Statutes Making Preferred Claims. Many states have statutes making certain labor claims preferred against the property of a debtor in the hands of an assignee or receiver.⁵⁰ A distinction is to be made between such statutes which create a lien and such statutes which merely give a preference between creditors.⁵¹

Said the Supreme Court of Illinois in 1907: "Statutes intended to secure wage earners against loss of their earnings from insolvency of employers are based upon a sound public policy, and should be liberally construed in order to accomplish the purpose of their enactment. But this rule can not be invoked for the purpose of supporting a decision not based upon the letter or spirit of the legislative enactment. Up to this time the legislature has not created any such lien, but has made debts due for labor preferred claims against the property of the debtor and made claims for wages preferred creditors and provided that they shall be first paid, which as we have already seen is quite a different thing from the creation of a statutory lien."⁵²

⁴⁸ *Stacey v. McNicholas* (1915), 149 Pac. 67, 76 Ore. 167.

⁴⁹ *Lockport Felt Co. v. United Box Board & Paper Co.* (1910), 182 Fed. 328.

⁵⁰ *Indiana* (1901), sec. 7058; *Illinois Acts of 1895* (Laws of 1895, p. 242); *Colorado Rev. St. of 1908*, secs. 6998-7000.

⁵¹ *Seymour v. Berg* (1907), 227 Ill. 411, at 420, 81 N. E. 339; *Mc-*

Daniels v. Osborne (1905), 166 Ind. 1, 75 N. E. 647; *Central Savings Bk. v. Newton* (1915), 147 Pac. 690, 59 Colo. 150; *contra*, *Small v. Hamnes* (1901), 156 Ind. 556, 60 N. E. 342; *Bell v. Hiner* (1896), 16 Ind. App. 184, 44 N. E. 576; *overruled by* *McDaniels v. Osborne* (1905), 166 Ind. 1, at 5, 75 N. E. 647.

⁵² *Seymour v. Berg* (1907), 227 Ill. 411, at 420, 81 N. E. 339.

“Where a receiver is appointed to take possession of chattels covered by a chattel mortgage, after condition broken, as provided in General Code of Ohio, sec. 8339, Revised Statutes, sec. 3206a, such chattels, to the extent that the same may be required to satisfy the mortgage, are the property of the mortgagee and not the mortgagor.”

“When a sale is made by the receiver of such mortgaged premises,⁵³ the judgment of distribution should be to apply the net proceeds of the sale of the property covered by each chattel mortgage to the payment of the amount due upon such mortgage, preserving priorities where there are two or more chattel mortgages on the same property.”⁵³

What is meant by net proceeds would seem to be the proceeds, less the cost of selling the chattels, such cost to be not in excess of what the mortgagees could sell the same for under ordinary foreclosure proceedings. In other words, the receiver, by selling the chattels and realizing on them, has performed a service for the mortgagee which he ought in equity and good conscience to pay for, but he should not be called upon to pay more unless he has either expressly or impliedly or by estoppel agreed to pay more.

For a full discussion of cases where a mortgagee pays the costs of realization and preservation, see under those respective headings and paragraphs in this chapter.

§ 862. Distribution of Fund Created by Action of Certain Creditors. When certain creditors at their own expense, with the sanction of the court, authorize the receiver to collect a special fund, the general creditors can only share in the proceeds from such collection. in the event there was a surplus after paying the certain creditors who contributed to the expenses of such collection. The receiver who collected such funds on behalf of such certain creditors might be allowed fees for such work. He could not charge, however, the general expense of administration upon such special fund, neither could

⁵³ *Machine Co. v. Supply Co.* (1903), 68 O. S. 542, 67 N. E. 1055.

he charge general receiver's commission on that fund, but only on the surplus which went to the general creditor.⁵⁴

§ 863. Distribution to Lienholders. The ordinary appointment of a receiver does not affect the right of the property or interests or rights in the property.⁵⁵ The court should strictly guard and maintain the integrity of contracts and do that rigidly, rather than by a liberal construction of the powers of the court subject the property in the hands of receiver to charges to the prejudice of creditors, either lienholders or others.

A mortgage creditor, not seeing fit to foreclose his mortgage, but preferring to let the receiver administer and sell the mortgaged property under orders of the court, must permit the proceeds of the sale to bear their proportionate share of the fees allowed the receiver and his attorney.⁵⁶

§ 864. Distribution between First and Puisne Mortgagees. "When money is in the hands of a receiver, you must look in each case to all the circumstances, and in particular to the nature of the action and the object of the appointment of the receiver. When the object of the action is to ascertain who are the incumbrancers on a particular property and their priorities (in other words, in an action to marshal liens), or to settle a dispute as to title, it may well be that the receiver holds money coming into his hands on behalf of the person who may prove to be the true owner."⁵⁷ A first mortgagee from the date of the service of his notice of motion to discharge the receiver, or to be let into possession and into receipt of the rents, must be treated as having been in possession of the mortgaged property and therefore entitled to the rents

⁵⁴ *Cornell v. Nichols & Langworthy Mach. Co.* (1912), 201 Fed. 320, at 323.

⁵⁵ *Raht v. Atrill* (1887), 106 N. Y. 437, 13 N. E. 282.

⁵⁶ *In re Receivership of Farmers*

Union Warehouse Co. (1914), 135 La. 970, at 973, 66 So. 315. See *In re J. D. Connell Iron Works* (1916), 138 La. 702, 70 So. 617.

⁵⁷ *In re Hoar* (1892), 3 Ch. D. 94, at 103.

and profits which from that date came into the hands of the receiver.⁵⁸

For a fuller discussion and more cases see ch. IX.

§ 865. Practice of Asserting Liens. Proper procedure requires the lienholder to apply to the chancellor for an order to the receiver to hold the funds in lieu of the property.⁵⁹ The property is in the custody of the law subject to a valid lien, and the only way the property can ordinarily be realized upon is by a sale under the order of the court or by the court consenting to a foreclosure of the lien under the statute.⁶⁰

§ 866. Lienholders to Be Made Parties. Said the Supreme Court of Ohio as follows: "Where two parties each hold a lien on the same premises, and each of them seeks the enforcement of his lien by a distinct and independent proceeding, and the party holding the inferior lien first obtains a sale of the premises, the proceeds of which sale are in the hands of the court, it is good practice, and in accordance with the policy of the law, to permit the party holding the inferior and preferable lien to come in and be made a party to the proceeding of the one holding the inferior lien, and to order a distribution of the proceeds of the sale in accordance with the rights and priorities of the parties respectively."⁶¹

§ 867. Payment of Interest on Claims. The general rule is that interest is not allowed after property of the insolvent is in custodia legis. This rule is not based on loss of interest-bearing quality, but it is a necessary and enforced rule incident to equality of distribution between creditors of assets, which in most cases are insufficient to pay all debts in full.⁶² Supply creditors to a railway who are preferred and the fund for

⁵⁸ Preston v. Tunbridge W. & H. Ltd. (1903), 11 Ch. D. 325.

⁵⁹ Raht v. Atrill (1887), 106 N. Y. 423, at 431, 13 N. E. 282.

⁶⁰ Baldwin v. Spear Bros. (1905), 79 Vt. 43, at 52; Pickering v. Richardson (1910), 57 Wash. 117, 106 Pac. 614.

⁶¹ Syllabus (law of Ohio) by the court in Porter v. Barclay (1869), 18 O. S. 546.

⁶² American Iron Co. v. Seaboard Air Line (1913), 233 U. S. 261, 58 L. ed. 949, 34 S. C. Rep. 502, where a full discussion of the subject is entered into.

their payment is sufficient to pay them in full, may be allowed interest on their claims after the appointment.⁶³ Lien claimants are generally entitled to interest.⁶⁴

“After property of an insolvent passes into the hands of a receiver, or of an assignee in insolvency, interest is not allowed on the claims against the funds. The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estates.”⁶⁵

§ 868. Payment of Dividends to Secured Creditors. Said the Supreme Court of the United States in the case of *Merrill v. Bank*, 173 U. S. 131: “A secured creditor of an insolvent bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collateral or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when, from them and from collaterals realized, the claim has been paid in full.”⁶⁶

Until a creditor's debt, whether secured or not secured, is paid in full, principal and interest, up to the time of the appointment of a receiver, the creditor is entitled to such dividends as may be declared upon the total of the debt proved. In case the claim of the creditor is represented by several notes, each of which is secured by various assigned accounts, and collections have been made on such accounts, then the creditor has a right to receive such a part of the funds distributed as his total claim proved bears to the total of the

⁶³ *Pennsylvania Steel Co. v. New York, etc.* (1914), 216 Fed. 458. See *People v. Loan & T. Co.*, 172 N. Y. 379, 65 N. E. 200; *First Nat. Bk. v. J. I. Campbell Co.* (1908) (Tex. Civ. App.), 114 S. W. 887.

⁶⁴ *Jourolman v. Ewing*, 85 Fed. 105; cited in *First Nat. Bk. v. J. I. Campbell* (1908) (Tex. Civ. App.), 114 S. W. 887.

⁶⁵ *Thomas v. Western Car Co.*, 149 U. S. 95, at 116, 37 L. ed. 663. See 135 S. W. 1139, 114 S. W. 887.

⁶⁶ Quoted in *Bank v. Flippen* (1912), 158 N. C. 334, at 336, 74 S. E. 100, citing *In re Bement's Sons* (1907), 150 Mich. 530, at 533, citing *Third Nat. Bk. v. Hang*, 82 Mich. 607, 11 L. R. A. 327; *Chemical Nat. Bk. v. Armstrong*, 59 Fed. 372, 28 L. R. A. 231; *People v. E. Remington & Sons*, 121 N. Y. 334, 24 N. E. 703, 8 L. R. A. 458; *In re Bates*, 118 Ill. 524, 9 N. E. 257; *Graeff's Appeal*, 79 Pa. 146; *Merrill v. National Bank*, 173 U. S. 131, 43 L. ed. 640, 19 S. C. Rep. 360.

demands, unaffected by the fact that he holds security for a part or for all its debt.⁶⁷

Mr. Justice White has held to the contrary in dissenting opinion.⁶⁸ Under the Connecticut Insolvency Act⁶⁹ the creditor can only prove his claim for the amount of it less the value of the security: In a receivership proceeding in Connecticut to wind up an insolvent corporation, it has been held the rule is the same.⁷⁰ It has been held in Mississippi, following Mr. Justice White's dissenting opinion in *Merrill v. Bank of Jacksonville*, that under an assignment for the benefit of creditors expressly directing the distribution to be ratable, it is impossible to tell what the real debt due the secured creditor was until he had sold his collateral and applied the money in reduction of his debt, and that balance of debt thus remaining constitutes the debt upon which alone he can prove.⁷¹ The same rule has been applied to receiverships in Mississippi.⁷²

§ 869. Distribution to Unsecured Creditors Not Parties.

The only justification for a court appointing a receiver over the property of a person or a corporation, is that the plaintiff has a lien encumbrance or charge or some claim against the property entitling him to evoke the interference of the court with the property of the defendant. A simple creditor, before he has reduced his claim to judgment and thereby obtained a judgment lien or by bringing a creditor's suit obtained an equitable lien, has no absolute right in the property of the defendant. Having no absolute right he has no right to intervene. The court may permit such creditors to intervene, but it rests within the discretion of the court.⁷³ If the creditor

⁶⁷ *In re E. Bement's Sons* (1907), 150 Mich. 530, at 534, 114 N. W. 329.

⁶⁸ *Merrill v. Bank of Jacksonville* (1898), 173 U. S. 131, at 147, 43 L. ed. 640.

⁶⁹ General Statutes of Connecticut, sec. 1942.

⁷⁰ *Peoples Bank v. Aetna Ind. Co.* (1916) (Conn.), 98 Atl. 353; *In re*

Waddell-Entz Co. (1896), 67 Conn. 324, at 338, 35 Atl. 257.

⁷¹ *Bank v. Duncan* (1904), 84 Miss. 467, at 472, 36 So. 690.

⁷² *Kretschmar v. First National Bank v. Greenville* (1907), 90 Miss. 363, at 374, 43 So. 474.

⁷³ *Herring v. Railway* (1887), 105 N. Y. 371, 12 N. E. 763; *Sands v. E. S. Greeley* (1897), 80 Fed. 195.

can not intervene, he is not a party to the suit, and a person who is not a party to an action is not entitled to apply by motion for payment of money to him by a receiver.⁷⁴

An unsecured creditor has no more absolute right to a distribution in the hands of an equitable nonstatutory receiver than he has to a distribution from the defendant himself. The defendant himself can make a distribution to some of his unsecured creditors, unless prevented by statute, and the court acting through its receiver, it would seem, would have the same right. However, a court of equity will do equity and endeavor to distribute the funds in its hands in an equitable manner. To do so, it will instruct its receiver to send word to the creditors and request them to file their claims with the receiver. When these claims are filed the court will order a distribution pro rata to those creditors whose claims are confirmed by the court and are on an equal footing. If some creditors fail to file their claims and the money is all distributed, they having originally no vested right to the funds, can not be allowed to complain. A creditor who has filed his claim, whether it be allowed or disallowed, may have the opportunity of questioning the propriety of allowing any other claim or claims.⁷⁵

When an equitable court appoints an equitable receiver to take charge of property and orders the receiver to make distribution to such creditors who have filed proper claims, other creditors are barred from participating in the distribution, but their claims are not necessarily barred against the defendant, neither does a part payment to a creditor bar his claim for the balance against the defendant.

Brewer, J., however, has gone pretty far in his statement as to the finality of a decree of distribution as against those creditors who had notice and make no pretense of want of notice or ignorance of the proceedings, and give no excuse for their failure to litigate their claims prior to the decree: "Under such circumstances, we dissent entirely from the contention

⁷⁴ Brocklebank v. East L. Ry. Co. (1879), 12 Ch. D. 839.

⁷⁵ Sands v. E. S. Greeley (1897), 80 Fed. 195.

that the decree was, as to their matters, merely an interlocutory order. That decree determined the rights of all parties interested in the proceeds of this property, and if one of these appellants after notice failed to assert his rights or to challenge the allowances then made by the court, his rights and challenge were lost. He had his day in court and is concluded by the final decree.”⁷⁶

§ 870. Distribution to Resident Creditors Not Parties.

“The state, through its tribunal, may subject property situated within its limits owned by nonresidents to the payment of the demand of its own citizens against them, and the exercise of the jurisdiction in no respect infringes upon the sovereignty of the state where the owners are domiciled. Every state owes protection to its own citizens, and when nonresidents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such nonresidents to satisfy the claims of its citizens. It is in virtue of the state’s jurisdiction over the property of the nonresident situated within its limits that its tribunal can inquire into that non-resident’s obligations to its own citizens and the inquiry can then be carried only to the extent necessary to control the disposition of the property.”⁷⁷

Said LaCombe, J., Southern District of New York:⁷⁸ “It has been the practice in this court in receivership of this character (insolvent corporations) to carefully provide for the protection of the creditors of the insolvent corporation who may reside within this jurisdiction. Inasmuch as this court, by seizing the property, has deprived the residents of this state of the remedies they would have possessed under state law, it would seem to be eminently just and equitable to afford them this protection.”

⁷⁶ Leadville Coal Co. v. McCreery (1891), 141 U. S. 478, 35 L. ed. 824.

⁷⁸ Sands v. E. S. Greeley (1897), 80 Fed. 195.

⁷⁷ Pennoyer v. Neff (1877), 95 U. S. 723, 24 L. ed. 565.

§ 871. Distribution to Nonresident Creditors Not Parties.

"If any creditor, not a resident of this state, believes that he is entitled to participate in such distribution (of assets of insolvent corporation), he may submit proof of his claim to the receivers. If they reject the claim, as under practice prevailing here they undoubtedly will, such creditor is entitled to have the propriety of such action passed upon by the master to whom, in the first instance, all disputed questions as to the allowance or disallowance of claims are to be presented. If the master's decision be adverse to the creditor, he may review it upon exceptions to the report; and if such exceptions be overruled by the circuit court, such determination is a final decree, from which he may appeal to the circuit court of appeals. In this way the creditor's right to share in the distribution is judicially considered and decided as a question of right, unembarrassed by any exercise of discretion as would be the case if the same question were presented upon a petition of intervention." ⁷⁹

Wallace, C. J., passing upon some of the same questions in the same case says: "It is eminently proper that claimants residing within its jurisdiction should be relieved from the expense and inconvenience of proving their claims in other jurisdictions, and that provision should be made for securing to them equality of distribution in respect to the whole assets of the corporation, but there is no hard and fast rule to control the discretion of the court in making such distribution of the assets as shall be just to all creditors and ultimately effect a ratable distribution of all the property of the corporation." ⁸⁰ And yet he says further: "Courts of justice make no distinction between foreign and domestic creditors when their claims are of equal validity. After the appointment of the ancillary receivers, all creditors of the insolvent corporation, who had not acquired some priority upon its assets, were upon an equal footing." ⁸¹

⁷⁹ Sands v. E. S. Greeley (1897),
80 Fed. 198.

⁸⁰ Sands v. E. S. Greeley (1898),
88 Fed. 133.

⁸¹ Sands v. E. S. Greeley (1898),
88 Fed. 133.

CHAPTER XXXI

DURATION OF RECEIVERSHIP, REMOVAL AND DISCHARGE

ANALYSIS

- § 872. Duration of Receivership.
- § 873. Termination of Receiver's Official Relation.
- § 874. Termination of Receivership.
- § 875. What Is Removal of Receiver.
- § 876. What Is Vacation of an Order Appointing Receiver.
- § 877. What Is a Discharge of Receiver.
- § 878. Notice of Proposed Discharge of Receiver.
- § 879. Removal of Receiver by the Court.
- § 880. Removal of Receiver by Death.
- § 881. Removal of Receiver by Resignation Accepted.
- § 882. Supersedeas Does Not Discharge Receiver.
- § 883. Dismissal of Main Suit Does Not Discharge Receiver.
- § 884. Effect of Discharge—Generally.
- § 885. Effect of Discharge on Redelivery of Property.
- § 886. Effect of Discharge on Sale of Property.
- § 887. Appointing Successor of Receiver *Ex Parte*.
- § 888. Disposition of Receivership Funds under Final Decree.

§ 872. Duration of Receivership. Since property is placed in the hands of a receiver by order of the court which appoints the receiver, this property can only be released from the custody of the court by an order of that court. It therefore follows that the possible duration of the receivership is only limited by the duration of the court. Since the purpose of a receivership is either the preservation of the property or the realization of the same, the receivership should not be prolonged.¹ A court's duty is to decide controversies and not to administer property; the administering of property and the carrying on

¹ *Burroughs v. Toxaway Co.*, 185 etc., *R. & N. Co.* (1914), 140 *Pac. Fed.* 435; *Clumpner v. Spokane*, 365, 79 *Wash.* 278.

of a business under a receivership is only provisional to the main object of the court. Seven years is an unusual time to permit an estate to remain in the hands of receivers.²

The discretionary powers of the court in the matter of appointing a receiver continue through all the stages of the procedure. It is not limited to their first exercise.³ A court which has discretionary power to appoint a receiver and confers upon him certain functions may put an end to them whenever it deems it expedient to do so, but like all other judicial action resting in sound discretion, its exercise should always be grounded in some consideration of justice or convenience. It should never be exercised capriciously nor arbitrarily, but only for cause.⁴

§ 873. Termination of Receiver's Official Relation. The effect of the appointment of a receiver of the property of the defendant is to place that property in the possession of the appointing court. The receiver acts for the court. He is the hand of the court. The official relation of the receiver to the court may be terminated by his death, his resignation when accepted by the court, or his removal by the appointing court. The termination of the receiver's official relation to the court does not of itself take the property out of the custody of the court. When the official relation of the receiver to the court is terminated, the court may act itself concerning the property, or may appoint a new receiver to act for it concerning the property. A receiver may be removed, his resignation may be accepted, or he may die. In each of these cases, his official relation to the court has terminated. If, however, the receiver is discharged, or the order of appointment vacated, then not only is the official relation terminated, but the property is taken out of the custody of the court and either returned to

² Decker Bros. v. Berners Bay, etc. (1905), 2 Alaska 504.

⁴ McCullough v. Merchants, etc. (1878), 29 N. J. Eq. 218.

³ Wiswell v. Starr (1862), 50 Me. 381.

the original owner or handed over to someone else through sale or otherwise.

§ 874. Termination of Receivership. Although the termination of the official relation of the receiver to the court does not necessarily terminate the receivership, both may be terminated by the same act, namely the discharge of the receiver, or the vacation of the order of appointment.

When a receiver's official relation to the court is terminated by his death, resignation or removal, he may and may not have handed over the property by court order to the original owner or to someone else. If he has not handed over the property by order of the court, the property remains in the custody of the court. The term "discharge of a receiver" is used when the receiver in obedience to a court order has handed over the property to the original owner or to someone else. When the receiver has done that, his liability and responsibility as to that property ceases, and since the property is no longer in custodia legis, the receivership is terminated.

When a receiver has delivered over the funds or property in his possession pursuant to the order of the court whose officer he is, his official liability ends with the termination of his official existence, and a judgment against him thereafter is unauthorized.⁵

§ 875. What Is Removal of Receiver? The removal of a receiver is the separation of the person of the receiver from the office, duties and powers granted to the receiver by the appointing court and by the laws of the land. This separation may occur by the action of the court removing the person; by resignation accepted by the court, and by the death of the receiver. The appointment of the receiver, meaning the appointment of a particular person as receiver, is a matter of discretion with the court appointing him, and he holds his position by the suffrance of the court. He has no right to

⁵ Hanlon v. Smith (1909). 175 Fed. 192. and cases cited.

appeal from a decree removing him from his position.⁶ Statutory provisions do not generally exist permitting an appeal from an order of the court removing or refusing to remove a receiver because such an order is purely discretionary. The receiver has no right to his office, neither have the parties to the suit any right to the appointment or removal of any particular person as receiver.

The effect of the removal of one receiver and appointment of a new receiver is only to substitute one person for another in the office. The cause of the removal of a receiver is some personal objection to him.⁷ The removal of one person or the appointment of a particular person as receiver rests in the sound discretion of the court making the order and is not appealable.⁸ Neither under the statutes of most states is such action of the court reviewable on error to a higher court. However, the appointment of a receiver, meaning the placing of the property in custodia legis, affecting a substantial right⁹ of the litigant, has been held to be reviewable in error proceedings under Ohio statutes.¹⁰ Federal and state statutes have made the appointment of a receiver, meaning the taking into custody of the property by the court, appealable. See sec. —.

§ 876. What Is Vacation of an Order Appointing Receiver?

To vacate the appointment of a receiver is to set aside the order of appointment because improperly granted, the motion for which is based on the circumstances and conditions attending the appointment.¹¹ The effect of the vacation of an order appointing a receiver is to discharge the receiver and the

⁶ *Bosworth v. Terminal R. Assn.* (1897), 80 Fed. 696.

⁷ *Pagett v. Brooks* (1903), 140 Ala. 257, at 260, 37 So. 263.

⁸ *Milwaukee, etc., Ry. v. Soutter* (1864), 154 U. S. 540, 17 L. ed. 616, 14 S. C. Rep. 1158; *First Nat. Bk. v. Barnum* (1886), 60 Mich. 478, 27 N. W. 657; *Bosworth v. Terminal R. Assn.* (1897), 80 Fed. 696; *State,*

ex rel., v. Sullivan (1908), 209 Mo. 161, 107 S. W. 487.

⁹ *C. S. & C. R. R. Co. v. Sloan* (1876), 31 O. S. 1.

¹⁰ Ohio General Code, sec. 12258, R. S., sec. 6707, Code of 1851, sec. 512.

¹¹ *Pagett v. Brooks* (1903), 140 Ala. 257, at 260, 37 So. 263.

surrender of the jurisdiction of the court over the property. Before courts surrender the property to the original owner or to third parties, they should provide for the payment of liabilities of the receivership.¹²

If the order appointing a receiver was void as being in excess of the jurisdiction of the court it is proper but not essential to vacate it and set it aside.¹³

§ 877. What Is a Discharge of Receiver? The discharge of a receiver relates to the termination of the receivership, and is asked for and ordered generally for the reason that because of conditions then existing there is no longer any necessity of continuing the receivership.¹⁴ Property rights may be affected directly by the refusal of a court to discharge a receiver as by its failure to appoint a receiver. Therefore, many of the states have passed statutes permitting an appeal from an order refusing to appoint a receiver, as they have permitted an appeal for failure to appoint a receiver.¹⁵ A receiver can at any time be removed by the court which appointed him and another receiver appointed. This does not affect property rights, but the discharge of the receiver or the vacation of the order appointing the receiver may affect property rights. "When a receiver has delivered over the funds or property in his possession pursuant to the order of the court whose officer he is, his official liability ends with the termination of his official existence, and a judgment against him hereafter is unauthorized."¹⁶

A receiver should not be discharged nor his bond cancelled until he has made payments and otherwise acted according to the orders of the court appointing him.¹⁷

¹² *Davis v. Duncan* (1903), 19 Fed. 477; *Farmers L. & T. Co. v. Railway* (1880), 7 Fed. 537; *Johnson v. The C. T. Co.*, Rec. (1884), 159 Ind. 605, 65 N. E. 1028.

¹³ *Wieneke v. Bibby* (1910), 15 Cal. App. 50, 113 Pac. 876.

¹⁴ *Pagett v. Brooks* (1903), 140 Ala. 257, at 260, 37 St. 263.

¹⁵ 26 U. S. Stat. at Large, 828, par. 7; 31 Stat. L. 660; 36 Stat. 1134; U. S. Compiled Stat. of 1916, sec. 1121 et seq. See Code of Alabama of 1896, secs. 429 and 800.

¹⁶ *Hanton v. Smith* (1909), 175 Fed. 199.

¹⁷ *Equitable Trust Co. v. Childs*, et al. (1913), 143 N. Y. S. 17.

After a receiver's discharge he ceases to be a representative of the court, therefore he can neither sue nor be sued as representative of the estate.¹⁸

§ 878. Notice of Proposed Discharge of Receiver. No statute generally exists requiring notice to be given when a motion to discharge a receiver is to be heard. The passing on the discharge of a receiver by the court generally contemplates the fixing of the receiver's fees, distribution generally of the money in his hands, accepting of the receiver's final report. Notice should be given to all parties to the suit and to creditors interested in the distribution, even in the absence of a statute or a court rule on the subject.¹⁹

§ 879. Removal of the Receiver by the Court. It was formerly the practice of the court to request the master to select a receiver and report to the court. Now, in most jurisdictions, the court selects the receiver but will listen to recommendations by parties to the suit. The court determines the fitness of the party selected. If the court selects a receiver for his fitness, the court must also have the power to remove him for his unfitness.²⁰ The receiver has no right to appeal from a decree removing him from his position, for that is a matter of discretion with the court appointing him, and he holds his position by the suffrance of the court.²¹

§ 880. Removal of Receiver by Death. The death of a receiver does not affect the receivership or deprive the court of the custody of the property. When such death takes place,

¹⁸ *Heidbrink v. Railway Co.* (1908), 133 Mo. App. 35, at 38, 113 S. W. 223.

¹⁹ *In re Wagner* (1915), 173 Iowa 299, 155 N. W. 317; *Williams v. Trust Co. Co.* (1904), 126 Iowa 22, 101 N. W. 277; *Isnard v. Cazeaux*, 1 Paige (N. Y.) 39. See also *Ruggles v. Patton*, 143 Fed. 314, 74 C. C. A.

452; *Merchants Bk. v. Crysler*, 67 Fed. 388, 14 C. C. A. 444.

²⁰ *Mercer v. Kansas, etc.*, 5 Dill. 476, at 478; *Wood v. Oregon Dev. Co.* (1893), 55 Fed. 951; *Continental Trust Co. v. Toledo*, 59 Fed. 514.

²¹ *Bosworth v. Terminal R. Assn.* (1897), 80 Fed. 969.

either party to the suit upon suggestion of the fact to the court may be entitled to have another person appointed in place of the deceased.²²

§ 381. Removal of Receiver by Resignation Accepted. A court may permit a receiver to resign.²³ But it is not a matter of course to change a receiver upon his own application. He must show reasonable cause why he should be relieved from the further performance of duties which he has voluntarily agreed to perform.²⁴ On such a showing his application may be granted.²⁵

§ 382. Supersedeas Does Not Discharge Receiver. "A supersedeas is only intended to stay further proceedings, to leave matters in the condition it finds them, until the appellate court can hear the case and pass on the questions involved in the appeal; it informs the sheriff that the record has been removed into the appellate court for the correction of errors, and enjoins upon him to give notice to the other party, to appear in the appellate court and answer the complaint in error. * * * A writ of supersedeas is usually awarded to a final judgment at law, or a decree for money, to stop its enforcement until the appellate court can review the errors complained of in the proceedings in which the judgment or decree was rendered. It leaves the case to stand in statu quo until this is done." ²⁶

If a receiver is in the possession of property at the time the supersedeas is allowed, he is not thereby removed. Either party may move the lower court for the appointment of a receiver pending the appeal, or if there be a receiver he may

²² Brien & Thaxton v. Paul (1877), 3 Tenn. Ch. 357.

²³ Saulsbury v. Lady Ensley, etc. (1895), 110 Ala. 596, 20 So. 72; Smith v. Vaughan (1744), Ridg. Rep. 251.

²⁴ Richardson v. Ward (1822), 6 Madd. 266; Beers v. Chelsea Bank

(1834), 4 Ed. Ch. (N. Y.) 277; Saulsbury v. Lady Ensley (1895), 110 Ala. 596, 20 So. 72.

²⁵ Richardson v. Ward (1822), 6 Madd. 266.

²⁶ Bristow v. Home Bldg. Co. (1895), 91 Va. 18, at 29, 20 S. E. 946.

apply to the court appointing him for its guidance and direction.²⁷

A receiver appointed by an interlocutory order of a state chancery court is not removed by an appeal of the main cause of action to the supreme court of that state, although that appeal may suspend, or vacate the final decree below.²⁸

§ 883. Dismissal of Main Suit Does Not Discharge Receiver.

The right of the defendant to settle and of the plaintiff to dismiss his petition is not to be abridged. With the exercise of these rights, the court has but little concern; but neither the settlement by the defendant, nor the dismissal of his suit by the plaintiff, operates to discharge the receiver, or to take the fund in his hands out of the possession of the court. That can only be done by an order of the court, which will not be granted until it has been made satisfactorily to appear that the interests of the creditors of the defendant will not be prejudiced. If the receiver has been directed to sell property of the defendant, the dismissal of the main suit by the plaintiff does not operate to discharge the receiver or to otherwise dispose of the said property.²⁹ Where in such a case the holder of a lien, or other creditor of the defendant, before the receiver has been ordered to surrender the assets in his hands, makes a claim thereto, the court may, notwithstanding the dismissal of the original suit, retain jurisdiction of the fund, under a proper petition of the creditor or creditors.³⁰

A decree dismissing the bill of complainant or plaintiff, although finally disposing of the case on its merits adversely to the complainant at whose instance the receiver was appointed, does not ipso facto discharge the receiver. His functions must be terminated by a final order of the court which appointed him.³¹

²⁷ *Bristow v. Home Bldg. Co.* (1895), 91 Va. 18, 20 S. E. 946.

²⁸ *Brien & Thaxton v. Paul* (1877), 2 Tenn. Ch. 357.

²⁹ *Fountain v. Mills* (1900), 111 Ga. 122, 36 S. E. 428.

³⁰ *Fountain v. Mills* (1900), 111 Ga. 122, 36 S. E. 428.

³¹ *Pagett v. Brooks* (1903), 140 Ala. 257, at 262, 37 So. 263. See *Simmons v. Shelton* (1895), 112 Ala. 284, 21 So. 300; *Scott v. Ware* (1880), 65 Ala. 174.

When a bill is finally dismissed without appeal, merely the legal occasion for a receivership ceases, not the receiver's duty to the court. The duty to the court ceases only with the receiver's discharge. True, the discharge should ordinarily concur with the entry of a final decree between the parties, but there are instances where it does not.³²

Said Lord Langdale, M. R., in 1841, "Where a receiver is appointed under the authority of the court, he is appointed for the benefit of all parties interested, and therefore he will not be discharged merely on application of the party at whose instance he was appointed." ³³

When the main suit is dismissed and the rights of the parties are finally established, the receiver must account to the court appointing him for money or property which is in his hands.³⁴

§ 884. Effect of Discharge—Generally. The effect of the discharge of a receiver and surrender of jurisdiction over the trust without any reservation as to existing claims is to release not only the receiver, but also the property from further liability.³⁵ A judgment of allowance against a fund does not become a technical lien on the property which comprises the assets, as a judgment lien is but the creature of statute, and there is no statute in most states providing for a lien in such circumstances.³⁶

Funds and property in the hands of a receiver are subject to the right of the court appointing him; he appropriates so much of the same as might be necessary in liquidation of the indebtedness of the receivership. When a judgment is rendered against a railroad and its receiver after title passed to another company, the latter is not liable for the judgment, though

³² Steele v. Ruprecht (1909), 147 Ill. App. 653.

³³ Bainbrigge v. Blair (1841), 3 Beav. 421, and cases cited.

³⁴ Eichert v. Eichert (1905), 28 Ohio C. C. 795; affirmed. 74 O. S. 512.

³⁵ Johnson v. Central T. Co. (1902), 159 Ind. 605, at 609, 65 N. E. 1028; Hanlon v. Smith (1909), 175 Fed. 199.

³⁶ Johnson v. Central T. Co. (1902), 159 Ind. 605, at 609, 65 N. E. 1028.

the property was not actually turned over until after the rendition of the judgment.³⁷

Where an order is made discharging an acting receiver and releasing him from further liability, yet shows there was money on hand which such acting receiver was directed to pay was subject to the order of court and the money was not fully and finally disbursed, the jurisdiction of the court was not terminated and the court upon an *ex parte* application without notice may appoint a successor receiver.³⁸

§ 885. Effect of Discharge on Redelivery of Property.

When a receiver is about to be discharged and the property redelivered to the owner, the receiver on the one hand is entitled to protection from liability, and on the other hand, just claims are entitled to be paid. In such cases provision is generally made for operation liabilities during the receivership and judgments rendered or to be rendered in favor of intervenors.³⁹

When property is redelivered to the original owner by order of the court, the original owner may be liable to a party injured while traveling on the road during the receivership. The conduct of the railroad company in procuring, or at least in acquiescing in the withdrawal of the receivership and the discharge of the receiver and the cancellation of his bond, and in accepting the restoration of the road largely increased in value by the betterments made by the receiver, affords grounds to charge an assumption of such valid claims against the receiver as were not satisfied by him, or by the court which discharged him.⁴⁰

Where a receiver turns over to the company owning it the plant and assets in his hands, upon the condition that all contracts and liabilities of the company incurred by, or incum-

³⁷ *Brockert v. I. C. Ry. Co.* (1893), 151 U. S. 81, 38 L. ed. 81, (1894), 93 Iowa 132, 61 N. W. 405. 14 S. C. Rep. 250.

³⁸ *Taylor v. Easton* (1910), 180 Fed 363, at 367.

³⁹ *Texas & Pac. Ry. v. Johnson*

⁴⁰ *Texas & Pac. Ry. v. Bloom* (1896), 164 U. S. 636, 41 L. ed. 580, 17 S. C. Rep. 216; *Baltimore & Ohio v. Burris* (1901), 111 Fed. 884.

bent on him, as receiver, shall be assumed by the company, a claim on which suit has been brought against him as receiver for damages for personal injuries is included therein and the plaintiff in the suit mentioned may maintain his action against the company.⁴¹

If the receiver has been discharged and the property turned over to the new company unconditionally and without reservation, the claims against the receiver will ordinarily go unpaid.⁴²

“After the discharge of a receiver appointed by a federal court and during the pendency of the receivership suit, a state court may appoint a receiver of the property who can hold it to the exclusion of the power of the federal court to appoint another receiver.”⁴³

§ 886. Effect of Discharge on Sale of Property. Where receivers appointed by the federal courts are unconditionally discharged and the property in their custody is released or delivered to a purchaser pursuant to a sale thereof under a decree of the court appointing the receivers, their liability as receivers is terminated. It does not follow, however, that the property turned over by the receivers is discharged from its liabilities incurred by them in operating the railroad while it was under their management. The rights of all persons having claims against the receivers as such growing out of their management of the railroad may be and frequently are saved and fully protected by the orders and decrees of the court in the receivership suit. In the decree in that suit for the sale of the property, also in that confirming the sale, the purchaser may be and frequently is required, as part of the consideration to be paid for the property, to assume and pay all liabilities incurred by the receivers at any time before their final discharge in operating the railroad in their custody,

⁴¹ *Brewing Co. v. Betz* (1906), 28 Ohio C. C. 484.

⁴² *Farmers L. & T. Co. v. Central R.* (1880), 7 Fed. 537. See *Kerr v. Little* (1884), 39 N. J. E. 83.

⁴³ *Kansas City, etc., Ry. Co. v.*

Latham (1916) (Tex. Civ. App.), 182 S. W. 717, citing *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 S. C. Rep. 570. See also *Calhoun v. Lanaux*, 127 U. S. 634, 32 L. ed. 297, 8 S. C. Rep. 1345.

and the jurisdiction and right of the court may be reserved to retake the property and resell the same for such liabilities, if the purchaser shall fail to pay the same after they are finally established. When an action has been brought against a receiver as such before his discharge, and the purchaser of the property has assumed liabilities of the receiver, it has been held proper practice to join the purchaser of the property as joint defendant.⁴⁴

§ 887. Appointing Successor of Receiver Ex Parte. After a receiver has been properly and duly appointed, the property is in the custody of the court. An emergency may arise making it necessary to change the personnel of the receiver. It is clearly within the authority of the court to accept the resignation of the first receiver and appoint a successor, and this may be done *ex parte*,⁴⁵ and on the court's own motion.⁴⁶ Even when the debtor has assigned his property to the receiver, it has been held that the property of the debtor was really vested in the court, for the receiver's possession was the court's possession. The functions of the receivership continued and upon the receiver's death devolved upon the court. It was, therefore, competent for the court to appoint a new receiver to carry on suits commenced by the former, and in other respects to fulfill the duties which the first receiver left incomplete.⁴⁷

Appellate courts have said that an agent of a corporation seeking the appointment of a receiver who is actually engaged in pressing its claims against the debtor should not be appointed receiver of his property,⁴⁸ and the Supreme Court of South Carolina in an appeal on the question of whether or not the plaintiff showed a case warranting the appointment

⁴⁴ *Hanlon v. Smith* (1909), 175 Fed. 192.

⁴⁵ *Taylor v. Easton* (1910), 180 Fed. 363, at 367; *Nichol v. Murphy* (1906), 145 Mich. 429, 108 N. W. 704.

⁴⁶ *In re Estate of Graff* (1910), 86 Neb. 535, at 539, 125 N. W. 1091.

⁴⁷ *Nichol v. Boyd* (1882), 90 N. Y. 519.

⁴⁸ *Virginia-Carolina Chemical Co. v. Hunter* (1909), 84 S. C. 214, 66 S. E. 177.

of a receiver, affirmed the judgment of the court below in appointing a receiver, but objecting to the personnel of the receiver for the reasons above set out granted leave to the defendant below to move before the court for the removal of the then present receiver and the appointment of a disinterested person in his stead.⁴⁹

§ 888. Disposition of Receivership Funds under Final Decree. Said the Supreme Court of Missouri in 1912: "A final decree terminates the rights of the parties on all points in issue. When there is a receiver in the case it is proper that in the final decree he should be directed to make disposition of funds and property in his hands and report subsequently what he has done in obedience to the decree.

"If his report filed at a subsequent term shows that he has acted contrary to the decree, parties have a right then to except to his action, but if he has acted in accordance with the decree the party deeming himself aggrieved can be heard in an appellate court only on appeal from the decree."⁵⁰

⁴⁹ Virginia-Carolina Chemical Co. v. Hunter (1909), 84 S. C. 214, at 224. 66 S. E. 177.

⁵⁰ Trendley v. Illinois Trac. Co. (1912), 241 Mo. 73, 145 S. W. 1.

